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Herman Melville and the Law

Jill Louise McKinney

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Herman Melville and the Law

Abstract

Melville could complain after writing *Moby-Dick* that he swam through libraries in pursuit of the white whale. The research for the background of this study has led of necessity to libraries and rare book collections, to musty shelves of digests and almanacs, old law journals and magazines, mouldering diaries, private notes and correspondence, through tattered pamphlets, tomes of congressional records, census reports, annals of towns and states, of bar associations and historical societies, and of course to some of the studies by social-intellectual historians, legal philosophers, and literary critics. The selection of material which appears in the bibliography appended to this work represents only that portion of the above which I found occasion to cite in the text, although I have included a few items which I consider indispensable to the context of the study.

Wherever possible the notes follow the style recommended by the Modern Language Association. Exceptions are the cases cited, all of which are to be found in the Massachusetts Reports. The documentation for these items follows the practice generally accepted by present day legal historians, of which the model is as follows: volume number, name of the reporter, (date) page number; e.g. 10 Metcalf (1845) 93.

In presenting my conclusions about the relationship between Melville and the law it was necessary at times to summarize some very complex matters of law and of legal history. To omit these sections, tedious though they may be to those readers whose primary interest is literary, would be to suppose a great deal of technical knowledge on the part of scholars who are not lawyers. Moreover, some explanations---that of "codification" (Chapter V)---are difficult to come by anywhere else, at least in succinct form. I must therefore beg the indulgence of the reader for bearing with me through these necessary digressions from our primary concern with Melville and his work.

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HERMAN MELVILLE AND THE LAW

Jill Louise McKinney

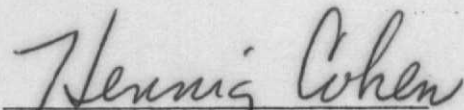
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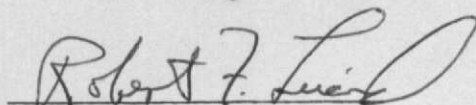
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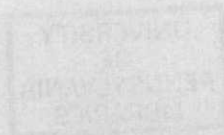
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PREFACE

Melville could complain after writing Moby-Dick that he swam through libraries in pursuit of the white whale. The research for the background of this study has led of necessity to libraries and rare book collections, to musty shelves of digests and almanacs, old law journals and magazines, mouldering diaries, private notes and correspondence, through tattered pamphlets, tomes of congressional records, census reports, annals of towns and states, of bar associations and historical societies, and of course to some of the studies by social-intellectual historians, legal philosophers, and literary critics. The selection of material which appears in the bibliography appended to this work represents only that portion of the above which I found occasion to cite in the text, although I have included a few items which I consider indispensable to the context of the study.

Wherever possible the notes follow the style recommended by the Modern Language Association. Exceptions are the cases cited, all of which are to be found in the Massachusetts Reports. The documentation for these items follows the practice generally accepted by present day legal historians, of which the model is as follows: volume number, name of the reporter, (date) page number; e.g. 10 Metcalf (1845) 93.

In presenting my conclusions about the relationship between Melville and the law it was necessary at times to summarize some very complex matters of law and of legal history. To omit these sections, tedious though they may be to those readers whose primary interest is literary, would be to suppose a great deal of technical knowledge on the part of scholars who are not lawyers. Moreover, some explanations---that of "codification" (Chapter V)---are difficult to come by anywhere else, at least in succinct form. I must therefore beg the indulgence of the reader for bearing with me through these necessary digressions from our primary concern with Melville and his work.

INTRODUCTION

Following his return from the South Seas, Herman Melville enjoyed an exciting but haphazard intellectual development. With an eager but indiscriminate vigor he explored almost every field of knowledge that appeared on his horizon. Modern scholars have found that retracing this "chartless voyage" may prove to be a never-ending task. Yet until every island of thought in Melville's private archipelago has been located, there will remain treacherous shoals and currents ready to carry criticism aground.

Researchers have already produced full length studies of such subjects for example as his religious thinking, his use of Milton, Shakespeare, classical mythology, and the Bible, his interest in time, the influence of nineteenth century science, and even his acquaintance with the esoteric field of Assyriology. Despite the fact, however, that many of his kin and nearly everyone of importance that Melville knew in his lifetime was a lawyer, a judge, or a person with a law education, no one until now has given more than passing interest to what it might mean to have such extensive contact with the law as a science and a philosophy.

Among the critics, only Herbert F. Smith has come close to uncovering the depth of legal science in Melville's storehouse of information. Smith's 1965 study of Bartleby ("Melville's Master in Chancery and His Recalcitrant Clerk," American Quarterly, 17 734-41), begins with the assumption that the profession of the narrator is of vital importance to a correct reading of that story.

He notes at the outset that "considering his voracious and un-disciplined reading, we should not be too surprised to find that Herman Melville had a considerable acquaintance with some of the more arcane points of law and Anglo-American legal history" (p. 734). The article demonstrates that Melville did indeed know and use legal terminology to make puns and other sly jokes in Bartleby. Smith also argues convincingly that this ex-sailor, gentleman farmer of the Berkshires was so well-versed in the peculiar evolution and character of the Court of Chancery as to be able to use the historic conflict between law and equity as an underlying metaphor of his story (p. 737). Modest though this piece of criticism may be (7 pages), it presents, nevertheless, undeniable evidence that Melville had more than superficial knowledge of the law in many of its complex and technical details.

If Bartleby were the only work in which Melville relied upon legal lore for the stuff of his fiction, one might dismiss its presence as mere illustration. A short survey will confirm, however, that most of the stories that Melville wrote present matters of law as an important part of the book. In Omoo the plot turns upon the legal difficulties of the mutineers; filler material is devoted to the theme of the conflict between native mores and the laws arbitrarily imposed by white men. Mardi's central plot crisis depends upon whether "Taji" is guilty of murder or of justifiable homicide. White-Jacket incorporates a brief against flogging and other forms of cruelty in the martial law. The chief conflict of Pierre involves the hero's disastrous attempt to make a practical application of the

principles of absolute justice. "Benito Cereno" had long puzzled critics with the legal addenda attached to it. The catalog could be extended, but it is perhaps preferable to conclude by remembering that Melville's last work, Billy Budd, remains one of the most powerful courtroom dramas ever written.

Even this cursory review exhibits at a glance the range and magnitude of the role given to the legal situation in Melville's writings. Plots, characters, conflicts, philosophical issues, all are at times informed by what might be a lawyer's or a jurist's way of looking at the world. To suggest an inevitable conclusion: legal material is present in Melville's work to a degree sufficient to warrant a thorough investigation of the relationship between Melville and the law.

Therefore, this study constitutes an exploration and demonstration of three major hypotheses. First, a review of the available biographical information establishes Melville's early and continued association with the law through family members and friends who were lawyers. Second, critical analysis of the internal evidence of the works reveals that he made use of a specialized knowledge of "some of the more arcane points of Anglo-Saxon legal history," not only in writing Bartleby, but throughout his career. Third, Melville found a source for a significant number of his ideas in the professional work of a man who has been called one of the most eminent jurists of the century: his father-in-law, Chief Justice Lemuel Shaw (1830-1860) of Massachusetts.

The report has been divided into six essays, the contents of which are outlined below:

Chapter I, "Background for Dilemma," is a survey of Melville's childhood and adolescence. This period of his life is sketched against the backdrop of family troubles arising out of a rapidly expanding and unstable economy. It becomes readily apparent that his family's characteristic response to crisis involved recourse to legal solutions. Once the moral implications of these facts are properly understood it can be seen that early in his life Melville learned a relativist way of thinking and was led to regard the world as ambiguous to valuation, a social reality woven out of many compromised contingencies and points of view. He also learned by observation the success, in a worldly way, of the lawyer's approach to problem-solving.

Chapter II, "The Influence of the Legal Mind," elaborates the premise laid down in the preceeding chapter that Melville shared many of the habits of thought common to lawyers. His efforts at writing occurred while he was associating with a group of New Yorkers, many of whom were lawyers. His brand of humor in puns, satires, caricatures, and anecdotal burlesques was developed against the sounding board of his immediate audience in New York City and Boston, a large part of which was made up of political journalists, lawyers, and litterateurs who had had a law education. Perhaps because of the literary tastes of these men, Melville concerned himself with "verity" and with offering his readers informative, polemical prose.

His peculiar stand on transcendentalism was identical in many respects to that approved of by the legal profession. The title of Chapter II reflects the debt owed to work begun by Perry Miller (The Life of the Mind in America, 1965) in delineating the influence of the legal mind as a broad cultural factor during the first half of the 19th century in America. However, in the present study some attempt had been made to separate this common experience from the more specific and intense contact enjoyed by Herman Melville during the same period.

While Chapter II deals with the influence of legalism in general, Chapter III, "The Rules of Evidence," demonstrates in detail Melville's use of a specific field of legal science. This portion of the study shows that Melville knew the textbook rules for evaluating the reliability of testimony and evidence and that he consciously employed these courtroom guidelines when he sat down to construct irresolvable ambiguities and ambivalences in Moby-Dick, Pierre, and "Benito Cereno."

Chapter IV, "Murder, Malice, and Moby-Dick," explores the relationship between certain notorious murder cases tried before Judge Shaw and the author's almost thematic preoccupation with the difficulty of deducing an intangible fact, such as malice, from external appearances. This section outlines the similarities between Melville's problems of epistemology and those debated by jurists during the first several decades of the 19th century. Two of the murder cases also suggest medical jurisprudence as a source for Melville's concepts of monomaniac insanity as it is found in Moby-Dick, Bartleby, and Billy Budd.

Chapter V, "Codification, or the Ambiguities," is a report on the activities of legal reformers Melville knew and the ways in which their activities may have had an impact on the writer's thinking. In a sense this chapter is a continuation and a development of material presented in Chapters III and IV; specifically it completes the discussion of the connection between Melville's constant troubling over what is knowable and the branch of legal science which concerned itself with the problems of deriving from experience that knowledge which is useful in establishing rules for ethical decision. There is a positive correlation between the morals and dilemmas of Melville's stories and the issues involved in the contemporary debate over codification. The controversy was over the question of whether it was advisable to reduce the common law to a code; that is, to a set of abstract principles to be used in deciding all cases. The alternative to this "codifying" of the common law required jurists to deduce legal principles from the precedents as each principle was needed again and again as each new case came before the court. The quarrel which ensued among lawyers and jurists over which method was more likely to produce a better decision is reflected in the pages of Mardi, Moby-Dick, the Confidence-Man, and especially, Pierre. The arguments lead to the problem of whether absolute or relative justice is more appropriate to temporal existence.

Each of the chapters from I through V deals with the admonitions and formulas of legal science which underpin Melville's sustained

inquiry into the problems of ethical decision in the circumstances of an ambiguous and ambivalent reality. However, Chapter VI, "The Cold Courts of Justice," shifts the focus away from the process of judging to the role of the judge himself. Billy Budd is reinterpreted in the light of Melville's long association with Judge Lemuel Shaw, who was his wife's father and an old family friend. The story is read under the hypothesis that the stand taken by Shaw on the question of the police power of the state, especially the part he played in the fugitive slave cases, provides the prototype for the role played by Vere in Billy Budd.

In short, the conclusions presented in this report should indicate accurately the extent to which Melville consciously borrowed the rationale for many of his most characteristic themes and techniques from the handbooks and conversations of lawyers and from his intimate contact with two eminent judges.

Chapter I

Background for Dilemma

During the Industrial Revolution in America individuals as well as communities were caught between the values and mores of two different worlds. The slow moving and easily understood ways of eighteenth century commerce, with its plain talk and its plain dealing, were giving ground rapidly to the problematic and stiffly competitive practices of the new capitalism. The ethics of the two systems were often in marked contrast.

Some people were able to endure the strain of the transition and profited from the conflicts. Others lost heavily. All of Herman Melville's near relatives were among the latter. They lost their fortunes in business failures and in the dissolution of their estates. The wealth and power they had built upon the old tradition fell before the demands of a new society. As a result, the Melvilles and Gansvoorts coming of age in the 1830's and 1840's found they were forced to earn a living, not by the manipulation of real estate and capital, as had their fathers and grandfathers, but by hard work.

Numerous critics have seen these circumstances to be the origin of Herman Melville's thematic preoccupation with the loss of Paradise. However, more far-reaching in effect than the material losses were the moral crises which plagued Melville family members whenever their financial affairs brought them face to face with ethical dilemmas arising out of real ambivalences in the changing times. Moreover,

because of the inadequacy of existing moral guidelines, some of these problems could be resolved only by the momentous expediency of going to law.

Nor were the Melvilles and Gansevoorts alone in these difficulties. Since the Revolution, Americans in increasing numbers had been taking their problems to lawyers. Alexis de Tocqueville thought Americans of the new republic were especially litigious because legal remedy was more cheaply available here than elsewhere, and because Americans, being in charge of their own political destiny, regarded the law as a possible means to obtain justice.

Chroniclers of the legal profession---Anton Chroust, for example---maintain that the promotion efforts of the bar associations had something to do with the increase of business during the first several decades of the century.¹ However, a more likely motivation behind all this legal activity was that the political and economic changes which marked America's emergence into a new world of industrialism had produced problems in human and business relations to which there were no traditional or clear-cut answers. Social and economic stability required that someone lay down the guidelines for the good faith necessary to business activity, and at this point in history only lawyers---as counselors, judges, and legislators---had the know-how to engineer workable solutions.

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Anton-Hermann Charles Chroust, The Rise of the Legal Profession in America (Norman: University of Oklahoma Press, 1965), II, 283-87.

During what is now called the "Formative Period" in American Law (roughly 1820-1860) American lawyers hammered out the details in our system of government. The law had to be adapted to new situations; and in many cases, new problems had to be posed in such a way that they were intelligible to a system of law which was built up in an older time. To complicate matters, controversy over what actually constituted American law would not be fully resolved until the end of the century. Confusion existed in particular as to whether the English Common Law was to be accepted here in whole, in part, or, as some argued, not at all. Although the unsettled state of our legal condition produced uncertainty and inconsistency in the short run, in the long run the situation allowed courts and legislatures the latitude they needed to meet the demands of a rapidly changing world.

The problems of individuals caught in these changing times were not always easy for the courts to resolve. Judges were aware that their decisions necessarily reached beyond the merits of the particular cases that came before them, and that the judicial process in which they were involved was heavily engaged in setting precedents. Even more: in rendering decisions, these judges were making choices about the conditions of freedom in the new world, incorporating some values into our law, while placing others on the shelf. Court decisions were responsible not just for resolving immediate or local conflicts of interest, but for channeling energy and resources in ways that would affect the entire social and economic structure of American life for generations to come.

The impact of such decisions upon acceptable standards of ethics was inevitable. The demands of a dynamic new society often forced individuals to act in ways that could not be countenanced by the moral values of an older, more sedentary civilization, and in these cases legal remedy offered arbitration and social sanction for the compromises that had to be made.

Unfortunately the process also sanctioned in the moral fabric of the community gaps in which pettifoggers and opportunists were quick to build their nests. Such abuse played a part in forming public opinion, teaching Americans to regard the law with mixed feelings. While the exigencies of the times moved them to embrace the social authority of legal solutions to their dilemmas, the opportunism of their contemporaries prompted them to be cynical about the value of the law and the sincerity of the legal profession. Individuals forced to resort to the courtroom to settle their affairs did so, perhaps, with the grim sense that, as Voltaire might have had it, going to court was the best possible solution in this best of all possible worlds.

Melville's attitudes toward the law have not gone entirely unnoticed. Most critics agree that he expressed cynicism and rebellion in his admiration of renegade heroes and in his frequent association of the law with dislikeable prudence.

See for example, Charles Mitchell, "Melville and the Spurious Truth of Legalism," Centennial Review, 12 (1968), 110-26; and Nicholas Canaday, Jr., Melville and Authority, University of Florida Monographs, Humanities No. 28 (Gainesville, Fla.: University of Florida Press, 1968).

These conclusions are valid as far as they go. Melville acquired a distaste for the legal process when he reacted both emotionally and intellectually to the stress of his family's affairs. But at the same time his dislike was modified by a grudging respect for the lawyer's ability to cope, however ignobly,³ with otherwise unmanageable situations: in cases of family crisis among the Melvilles and the Gansevoorts it had been the lawyers in the family who were best able to take care of their own interests while finding an equitable solution for the others.

In the mid-forties, after his return from sailing adventures, Melville spent a good deal of time in the company of lawyers, his brothers Allan and Gansevoort included. In addition, many of his acquaintances were literary men who had had a law education. At the same time he became closer to Lemuel Shaw.

Melville had, then, extended contact with members of the legal profession, and on that basis I believe it not unreasonable to infer that lawyers had a significant impact upon him. The influence of law and lawyers, I believe, can be shown to have affected Melville's taste, philosophy, and characteristic inclusion of some persistent elements of form and content in his work. His distrust of the legal profession forms only the negative side of the picture, important and lasting, but largely a product of his immaturity. As the years

³Herman Melville, Pierre, or the Ambiguities, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston, Ill.: Northwestern University Press, 1971), pp. 335-36.

went by, his attitudes changed. In this first chapter, however, we shall deal only with the lessons of his youth.

* * *

The story begins with the business career of Allan Melvill. Allan Melvill was defeated not because he lacked ambition to try for success in the very citadel of the emerging tradition, but because he was unable to bear the ruthlessness and expedient morality such success demanded. Some idea of what that jungle of unregulated enterprize asked of a man comes down to us from New York "robber baron" Daniel Drew, who said,

Sentiment is all right up in the part of the city where your home is. But downtown, NO. Down there the dog that snaps the quickest gets the bone. Friendship is very nice for a Sunday afternoon when you're sitting around the dinner table with your relations, talking about the sermon this morning. But nine o'clock Monday morning, notions should be brushed aside like cobwebs from a machine. I never took any stock in a man who mixed up business with anything else. He can go into other things outside of business hours. But when he's in the office, he ought not to have a relation in the world--- and least of all a poor relation.⁴

Drew speaks from an era a little later than that of Allan Melvill. By Drew's time the most successful men had accepted the expediency of separating the hearth from the shop. But Melvill was full of

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Leo D. Stone, "The History of Ethics in American Business," Ethics in Business, ed. Robert Bartels, Bureau of Business Research Monograph, No. 111 (Columbus, Ohio: Bureau of Business Research, College of Commerce and Administration, The Ohio State University, 1963), p. 35.

the "notions" from an older sense of morality that caused him much painful anxiety and prevented him from pursuing success wholeheartedly. In the end he had to let the law measure his conduct as his conscience could not.

Allan Melvill was a man caught between two worlds. Born in 1782, the fourth child of Boston merchant Thomas Melvill, he attained manhood before the Industrial Revolution had taken root in America. The virtues he was taught to admire and idealize belonged to the 18th century; but he was obliged to pursue success in business in the 19th century, while the distance between the two worlds widened as industrialism picked up momentum. Three sources give clues as to the kind of man Allan Melvill became: one is what we know of his father; another is the impression Allan made on his wife and her family; and the third is his correspondence with friends, relatives and business connections.

Biographies of Herman Melville remind us often that his grandfather, Major Thomas Melvill, was the last man in Boston to wear a cocked hat, knee breeches, and buckled shoes, garb symbolic of his refusal to accept change. Although the old hero of the Revolution was reluctant to move with the times, he could not have been as ridiculous as he appears in young Oliver Wendell Holmes' poem, "The
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Last leaf". A man's preference for the styles of his youth may

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Jay Leyda, The Melville Log: A Documentary Life of Herman Melville, 1819-1891 (1951; rpt. New York: Gordian Press by arrangement with Harcourt, Brace, and World, 1969), I, 47; subsequent references to Leyda appear in the text.

indicate something about his habit of mind and ideals, without providing adequate measure of his abilities. From an historical perspective Major Melvill did quite well, surviving even the notorious politics of the Custom House, an important and lucrative source of power in the days of mercantile economy. During the Jacksonian period immediately following his tenure as Collector of the Port, the party that dominated Boston politics became known as the Custom House Party, primarily because it owed its political strength to the number of offices and revenue privileges controlled by the Collector. If Thomas Melvill was able to keep an important position in the Custom House, even in the relatively genteel era of the Adams administration, it was not because the White House felt a compelling respect for the aged veteran, but because Melvill took care of his own interests and those of the party that placed him there.

Major Melvill's part in dumping the East India Tea Company's tea into the harbor indicates that he belonged to a radical branch of the patriot party, that which promoted the interests of American mercantilism by privateering and other illegal activity, such as smuggling, vandalism, and tax evasion. For him such sympathies formed no serious conflict with commonly accepted notions of honor and integrity. Colonial merchants regarded these acts as legitimate resistance to a foreign tyranny which left unchecked might erode what autonomy Americans possessed. In Puritan Boston the possible consequences of the British policy had been considered sufficiently alarming to warrant enlisting the support of the churches for

revolutionary activity. The coalition was reminiscent of ecclesiastical participation in the formation Cromwell's commonwealth in seventeenth-century England. In the American Revolution the mercantile interest and the Calvinist conscience were united, rather than in conflict. In the political revolution of 1776, moreover, one's enemy was an outlander, a British merchant, not, as in the cutthroat world of nineteenth-century American capitalist enterprize, one's neighbor, friend, or relative. Whatever conflicts existed potentially between honor and extra legal activity were resolved in the patriotic cause and in the dictates of the country's heritage of Puritan belief. The situation is familiar to the social historian as one in which integrity and duty are defined and applied within an individual's group, while unregulated behavior of the grossest sort is permitted with respect to outsiders. Such a convenient synthesis was not available to Allan Melvill several decades later when the necessities of doing business forced him to overstep the bounds of honor and integrity in dealing with the members of his own community.

If Major Melvill was foolish, it was in the way in which he raised his sons, Thomas, Jr. and Allan. Both men suffered reverses due in part to a sentimental attachment to virtues and ideals ill-suited to the practical business of life. Thomas evidently had high-flown notions of himself as a gentleman. In the opinion of his family these ideas had been the direct cause of his downfall into debt. Such feelings were probably behind Allan's giving a pound of snuff to the impoverished debtor lying in prison. Thomas resented

the gesture as a gibe unworthy of a brother. His appearance and mannerisms as he worked the fields in 1836 caused his imaginative nephew, Herman, to think of him as a "courtier of Louis XVI, reduced as a refugee, to humble employment, in a region far from gilded Versailles" (Leyda, I, 63-64); and it is probably true that a sojourn in Paris had done nothing for Thomas but refine sensibilities which would stand in the way of pecuniary success and prevent him from being anything but a refugee in his own country.

Allan too was given a gentleman's education and a Grand Tour of Europe before he settled down in Boston to import drygoods from Napoleonic France. In 1811, a British blockade of Boston put Allan
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and his partner out of business. Shortly thereafter, Allan appeared in Albany and began making acquaintances. He was one of what amounted to a horde of Yankees who were descending upon Albany, upsetting civil and social life alike. Allan managed to create a favorable impression upon the Gansevoort family, and upon their daughter Maria in particular. If we can accept the evidence of a contemporary portrait, Allan was a handsome young man, and Maria remembered him as both distinguished and attractive. He liked reading and exercising his imagination in creating "elegant compliments and delicate attentions" (Kenney, p. 174). His manners, like those of his brother Thomas, had been refined by the atmosphere of Paris. In short, Maria

found him sufficiently different from the Albany boys she knew to want to marry him.

Maria's family, on the other hand, accepted Allan as a businessman. It was no mean accolade if an Albany Dutch family of more than moderate fortune were to admire one's business acumen, especially if one were an outsider. Nevertheless, Allan Melvill succeeded in convincing the Gansevoorts that he combined in one and the same person the qualities of a gentleman and the sense of a sober man of business. The era was soon approaching when this combination might prove self-contradictory, especially in the jungle of the New York City business world, where "natural law" was no romantic ideal of truth and justice, but the basis of survival conditioned upon a gambler's success.

Later, Herman Melville caricatured the conflict that most men of good families experienced if they were called upon to scramble for a living along with the rest of the world. The difficulty was particularly acute if one arrived from the retreats of the country gentility to the stronghold of modern business, New York City. When Wellington Redburn or Pierre brought their romantic notions into the city, they rapidly found themselves doing foolish things, Pierre left his women in a police station under the care of what chivalry he supposed a policeman to possess; Wellington Redburn lost his rifle for a song and narrowly escaped being signed up for a cruise without pay. The guidebook incident in Redburn shows too that Melville was aware that the world was changing so rapidly that the wisdom one got from one's own father might be worse than useless in one's own

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time.

Allan, Sr., began his business career with his eye steady upon the main chance. His first venture was in Boston where his father no doubt had a sound reputation and many good contacts as Collector of the Port. Allan's choice of an import business was a natural course to follow. His removal to Albany was also governed by the sound reasoning that trade from the west was likely to increase, given the success of transportation improvements then being projected. Marrying into the Gansevoorts was another piece of solid business, bringing with it not only Maria's inheritance, which would accrue sometime in the future, but also Peter Gansevoort's important banking connections (Kenney, pp. 157-58). The union gave Allan a line of credit which might have proved handy in years to come.

From another standpoint, however, the Albany marriage was the first link in the chain of events that seduced Allan into difficulty. Maria would not inherit her fortune for many years. Meanwhile, she and the children proved expensive to maintain. Furthermore, Gansevoort money, whether in personal loans or in bank resources, tempted Allan to overextend himself in speculation. In other words, Allan was the victim of the commercial confidence game that he was eventually forced to play.

Within a short time Allan found that making money in Albany was

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Willard Thorp, "Redburn's Prosy Old Guidebook," Publications of the Modern Language Association, 53 (1968), 1146-56.

not so sure or easy as the bustling streets seemed to promise. Competition was stiff: the Yankees were shrewd, and the Dutch burghers were thrifty and clannish. By 1815, after another sojourn in Boston, Allan had settled in New York City where trade seemed even more brisk than in Albany.

Again Allan's reasoning was sound with respect to the opportunity available in New York City. He arrived just at the time when that city had begun stealing supremacy in trade and finance away from her two closest rivals, Philadelphia and Boston, and Allan was there to profit as he could. Allan was slow, however, to learn one major paradox: expansion brought with it a financial instability which the capitalist entrepreneurs knew better how to exploit than to control. Many who were highly visible were turning large profits, but were obscuring in their deliberate conspicuous consumption the great number of men who were merely scraping along or failing outright. Allan was to become one of the latter.

Melvill's disappointment was expressed repeatedly in his correspondence. In 1822 he wrote Shaw that competition in New York City was "much greater than you can imagine from your experience among our commercial acquaintance at Boston" (Leyda, I 10-11). The letter ends with a show of optimism and courage:

---as a place of Business New York stands unrivalled,
 & in this respect I prefer it any other, thus far I
 have succeeded beyond my expectations, & find my credit
 as well established as I could wish; my prospects are
 good, & with the favour of Providence, & my usual
 prudence and industry, I have no fear of the result. . .
 (Leyda, I, 11)

Read from the perspective of his eventual failure, Allan's invocation of "Prudence" and "Industry" and "Providence" strikes one rather like a man's vain prayers to household gods that will soon be as fallen and helpless as himself.

Yet Melvill repeatedly expressed his faith in the ultimate efficacy of the Protestant ethic. He presented the following summary of it as his last advice to nephew Thomas W. Melville who was about to embark for the Pacific on board the Brandywine:

. . . Fortune under favour of Providence is at your own disposal, you may mould it to your will, & render it subservient to your wishes, but everything depends on your personal exertions and application, for should you either be unjust to yourself, or neglect the advantages acquired through the kindness of friends, their good offices would be unavailing. . . . --- perform your Duty 'without fear and without reproach . . . sooner return no more, than come back to us disgraced---(Leyda, I, 26)

This letter too holds a shade of irony for those who know the tragedy which terminated the naval career of Guert Gansevoort, another of Melvill's nephews. "Duty," like "Prudence," was another ideal which was fast losing the pristine clarity of definition it had enjoyed in the 18th century when morality was less pluralistic or expedient. Allan's training in business methods and virtues which had stood his father well, was to prove inadequate---hampering even---for success and contentment in the new tradition.

Economic enterprize in New York City was a veritable wheel of fortune. Both here and abroad the ability to take risks and bear

the consequences "like a philosopher" was being touted as the peculiar genius of the American people, in part owing to the conditions of trade which characterized our nation's beginning.⁸ Such admiration, joined with the social pressures of a par venu society, sanctioned what the new business conditions demanded. The mores of the business world, formed overnight, as it were, with the changes of the weather, were nonetheless both real and demanding. Allan Melvill responded to these demands, and so compromised his older notions of prudence and honor.

In Allan's case, as in the case of China Aster in the Confidence-Man,⁹ one might say "the root of all was a friendly loan". Allan's borrowing started out by way of investments that he was able to talk friends and relatives into making. As the years went by, these sums became larger and larger. In 1823 Allan followed through with plans to adopt the auction method of selling (Kenney, p. 197). Instead of waiting for the storekeepers to come buy the goods stored in his warehouse, he sold them to the highest bidder as soon as they came off the ship. The system depended upon fast trading in large quantities, with the profit realized over a period of time. If he took temporary

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Miriam Beard, A History of the Business Man (New York: The MacMillan Company, 1938), pp. 501-18 and 626-32.

⁹Herman Melville, The Confidence-Man: His Masquerade (1954, rpt. New York: The New American Library of World Literature, Inc., 1964), p. 228; subsequent references in this chapter are to this edition and will appear in the text.

losses or was forced to sell goods almost at cost during one period, he could expect to make it up with somewhat larger than usual profits during another period. When business was slow, or as Allan expressed it, "brisk. . . with little profit," credit or loans might be required to tide the wholesaler through until business picked up.

Constant complaints, plus the evidence of numerous loans from the Gansevoorts and from Melvill's father, testify to the steady, wearying pressures of hustling which plagued him over the years. In 1827, he gave up importing on his own and went to work for another merchant. The rest of his income was to come from a speculation. This was a silent partnership in a wine and dry goods store, which Alice Kenney reports is the scheme into which Melvill invested \$10,000 of Gansevoort money (Kenney, p. 197).

he climax of the story is summarized by William Gilman with a terseness and economy difficult to improve upon:

In the summer of 1830 Allan Melvill's fortunes suddenly collapsed. Three years before, by exerting scarcely creditable pressure on his brother-in-law, he had borrowed over ten thousand dollars to supply the capital of a firm in which he became a secret partner. He would share half the profits; but in order to secure ready credit for the firm his personal interest was concealed so that he could give the endorsement of his own probity and established reputation to the checks of his two partners. From the start, the firm was a success, and in three years Allan Melvill reaped over fifteen thousand dollars. But as if in moral retribution for the dubious ethics of the arrangement, disaster fell suddenly upon him. He found himself unable to meet a particular note, and a merciless creditor refused an extension. In a few days his entire credit structure collapsed.

Gilman continues with this account of the resolution to the affair:

Sometime after the firm dissolved in the spring of 1830, in accordance with the terms of the original agreement, Allan Melvill went to Albany and confessed to the Gansevoorts that he was "utterly unable to pay" what he owed Peter. Catherine Gansevoort promptly added a codicil to her will charging Allan's debts to the share of Maria and her children in her estate, and Peter secured from Allan an assignment of his remaining interest in the unsettled accounts of the partnership. Though now a bankrupt, Allan attempted to form another profitable connection, but unable to raise capital he finally had to accept the management of the small Albany branch of a New York fur company.¹⁰

According to the older notions of right and wrong, Allan had indeed overstepped the limits of morality. His chicanery in concealing his interest in order to further endorse the credit of the firm, amounted to a misrepresentation of the risks involved for those who were thus induced to invest. In the days before the concept of corporate liability had been fully worked out, the secret partnership was sometimes a way for a man to share in the profits without risking all that he owned. Allan's role in persuading others to invest money in the business, in borrowing money which he knew he might not be able to pay back, and in resting the fortunes of his family upon the result of a speculation, constituted offenses against three of the cardinal virtues of eighteenth-century business ethics:

¹⁰William H. Gilman, Melville's Early Life and Redburn (New York: New York University Press, Washington Square, 1951), p. 41.

honesty, absolute liability for one's debts, and prudence.

Allan's correspondence testifies that honesty in business, as defined by the older notions of right and wrong, was among those qualities necessary for his self esteem. In 1823 he wrote Peter Gansevoort of the competition with which he was faced in his struggle for survival, commenting at the end: "I must either turn auctioneer or something else, for my present line will not give me an honest living & I want no other---" (Leyda, II, 904). By the standards of Allan's religious background and of his upbringing in the home of an eighteenth-century merchant with high demands upon personal honor, the concealment of the risk involved for investors was a clear breach of honest dealing. By the standards of behavior accepted among the merchant-entrepreneurs of the new business world, it remained questionable as to whether Allan was acting unconscionably.

In The Genius of Lemuel Shaw (Boston, 1962) Elijah Adlow undertook an analysis of fraud cases to appear in the 1830's and 1840's before the court of Lemuel Shaw, Allan's friend and respected advisor. It is significant that Adlow began his discussion with the observation that "just what constituted fraud or misrepresentation in the consummation of transactions was none too clear in the Shaw era."¹¹ Shaw himself was not always in agreement with his

¹¹Elijah Adlow, The Genius of Lemuel Shaw: Expounder of the Common Law (Boston: Sponsored by the Massachusetts Law Quarterly, 1962), p. 253; subsequent references to this work will appear in the text.

colleagues on the bench concerning fraudulent misrepresentation. His associates were inclined to base a decision on their opinion as to the intent of the defendant, whether he made false statements designedly to induce an agreement, or innocently out of mistaken judgment. But Shaw believed that the bench could not always infer a man's intentions from the facts. Therefore if false statements led to damages for the plaintiff, Shaw tended to fix liability for the statements without reference to intention (Adlow, p. 255). Although some of Shaw's fellow justices and many other tribunals during this period continued to emphasize intentions in their decisions, Shaw's opinions won a small but significant amount of contemporary support. This support has increased as the years have gone by, and today his estimation of the problem is taken to be the accepted principle.

Shaw's thinking with respect to the ambiguity of appearances and the necessity of judging a situation in terms of its pragmatic result was an anomaly for his time. In a later chapter this line of thought in Shaw's work will be studied for the possible relation it bears to Melville's own preoccupation with the inscrutability of reality, and, as in the case of Billy Budd, the irrelevance of intention to liability for one's actions.

For the moment, it is enough to note that members of the most august tribunals were sometimes at a loss how best to adjudicate cases of misrepresentation. If Shaw were to have judged Allan's case, one suspects that he would have been inclined to rule that

Allan was indeed responsible for any loss of money which had been invested by his endorsement of the firm's credit, but that he would have been slow to condemn Allan, if one may judge by his decision in Knowles v. Parker (Adlow, pp. 239-40), for a misrepresentation which led to enormous profits for all concerned. While such decisions did not remove the taint of "sharp" practice from Allan's actions, they did lend the sanction of the law to this kind of behavior whenever it produced good results. The means were excused for the sake of the end.

The "end" which Shaw had in mind, however, was not merely the individual profit enjoyed by a man like Allan Melvill, but the large scale marshalling of capital and promoting of investments that the nation so desperately needed to develop resources. Shaw in these cases, as in many others, made decisions with their long range effect firmly in sight. A modern analysis of Shaw's career on the bench marks him as foremost among those judges who willingly lent the weight of the law to encouraging enterprise to the limits of what economic stability could bear, but no farther.¹² If this current in the changing times tended to undermine the moral fiber of men like Allan Melvill who were induced to compromise their older and more constricted notions of ethical behavior, the sacrifice was an

¹²Leonard W. Levy, Chief Justice Shaw and the Law of the Commonwealth (Cambridge, Mass.: Harvard University Press, 1957), *passim*; see also James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (Madison: The University of Wisconsin Press, 1956), p. 19.

expenditure that Shaw and others like him were willing to make for the good of the general welfare as they saw it.

Allan's "scheme" actually netted him fifteen thousand dollars over the first three years of its existence. What it made for the others involved is not recorded, but total profit for the firm was apparently satisfactory. He lost a remaining five thousand dollars of Peter Gansevoort's money, the original investment of 1828, in a second venture, a business of his own which commenced during the summer of 1830 after his secret partnership had dissolved. Any "moral retribution" which Allan felt was the perception of a conscience formed for an earlier, simpler world. By the mores of the emerging tradition in the nineteenth-century business world, there could be only approval for his successful speculation in the wine business.

Misrepresentation is not the whole of Allan's story. He also shared his father's distress at the dishonor Thomas, Jr. brought upon the family by his bankruptcy and imprisonment for debt. It is true that some of this disgust stemmed from the fact that Thomas' misfortune had jeopardized his father's position in the Custom House; but much of it too was real pain that his brother should become involved in a situation that by eighteenth-century notions of absolute liability for debt was considered downright dishonest.

Alice Kenney offers the following evidence of just how strong that feeling could be at certain times and places:

When a man happens to break in Holland they say of him that he has not kept true Accompts. This Phrase, perhaps, amongst us would appear a soft or humorous way of speaking, but with that exact Nation it bears the highest Reproach; for a Man to be mistaken in the Calculation of his Expence, in his Ability to answer future Demands, or to be impertinently sanguine in putting his Credit to too great Adventure, are all instances of as much Infamy, as with gayer Nations to be failing in Courage or common Honesty. (Kenney, p.188)

Although Kenney takes this quotation from the Spectator of 1711, it expresses nevertheless an ideal of plain dealing reinforced in America by the maxims of Benjamin Franklin and all the "Dutch Uncles" who ever waived Father Abraham's Way to Wealth under the noses of their attentive charges. The feeling was that "common Honesty" demands that in repaying a loan you be "exact to the tick of your honor," as Melville's Franklin tells Israel Potter,¹³ and this feeling remained alive in the 19th century, long enough, in fact, to prevent the passage of general bankruptcy laws in the United States until well after the Civil War.

Much of Chief Justice Shaw's work on the bench during this period of growth and development was to find ways for accommodating the exigencies of commercial expansion to existing laws. The definitions of right and wrong depended upon what was best for the general welfare. Thus if a law permitting the discharge of in-

¹³Herman Melville, Israel Potter: His Fifty Years of Exile, The Works of Herman Melville Standard Edition, XI (London: Constable & Co., Ltd., 1923), pp 54-55; subsequent references appear in the text.

solvent debtors were to be a boon for the economy as a whole, such a law had to be available to the business community. Without going into the complicated explanation on economic grounds, one may state that the progressive faction of the business world, which was made up of the most influential financiers and merchants, agreed that the concept of absolute and unconditional liability for debt belonged to an earlier stage of the economy. Contemporary business conditions required that some alternatives be made available to the insolvent debtor and his creditors.

Shaw was Chief Justice of the Supreme Court of Massachusetts. This court was the leading state tribunal in the land at a time when the United States Supreme Court had not yet gained the ascendancy that it enjoys nowadays. Lemuel Shaw was thus one of the foremost jurists in the America of his day. His decisions were therefore instrumental in establishing the validity of state laws to discharge insolvent debtors in the face of a clause in the United States Constitution forbidding the states to make laws impairing the obligation of contracts (Adlow, pp. 261-63). Obviously, to men like Shaw and to the progressive merchant faction he supported, certain matters, such as liability for debt, were economic problems first, and moral problems second. The basic principle underlying this conclusion is that virtue and vice in a complex society can be defined only with reference to the sphere of activity in which such standards are to be operative.

This relativist way of thinking forms another important parallel

between prevailing legal philosophy of the kind Shaw came to represent and some of the characteristic, preoccupying themes of Melville's work. The maxim that honesty is the best policy is at least open to question. In the Confidence-Man, for example, one of the protagonists defends the fake soldier for pretending to have been wounded in a glorious, rather than ignominious, fashion in order to beg alms with better success (p. 105). In Israel Potter Benjamin Franklin cautions the young patriot to avoid even the appearance of evil. Melville also cites in that work the example of the patriarch Jacob, whose chicanery in wresting authority from Esau is presented in the Bible as all part of God's plan for the Jewish nation (Israel Potter, pp. 59-60).

By the progressive standards of the nineteenth-century business community, Allan Melvill's insolvency and need to compound his debts would not have been seen as an out-and-out disgrace; rather his situation would have been seen as a necessary and unpleasant adjustment of his affairs in a manner least likely to injure the rest of society. This attitude was precisely the same as that taken by Peter Gansevoort and Lemuel Shaw when the time came to disentangle Allan's affairs from the fortunes of the rest of the family.

Besides honesty and liability, the notion of "prudence"---and the part it played in Allan's business collapse---needs explanation. The ambivalent meaning of this concept in pre-Civil War America bears an important relationship to Herman Melville's interest in the idea of "confidence". There was a double standard for prudence in

the period of economic transition which we have been describing. By the system of eighteenth-century plain dealing, "prudence"--- as can be seen from the above quotation from the Spectator---required that a man not be "impertinently sanguine in putting his Credit to too great Adventure." But the business world of the 1820's and 1830's was learning to play the game of finance designed to increase the capital of the nation as a whole, and to amass it in blocks large enough to meet the demands of western development and the expansion of industrial power. One of the results of this movement was the creation of a host of innovations in finance, and these, in the atmosphere of laissez faire competition, frequently drove the small man out of business unless he combined with others or won the gamble of over-extending his credit. His situation differed from that of his eighteenth-century counterpart in that credit-financing might determine whether he would survive or fail, not whether he would get rich beyond his due. Prudence in the new business world demanded that one respond to fierce competition on its own terms or be driven under.

On September 12, 1826, Allan wrote apologetically to Peter Gansevoort,

---Business is about as dull and unprofitable as the most bitter foe to general prosperity, if such a being exists in human shape, could desire it, & it requires a keener vision than mine, to discern among the signs of the times, any real symptoms of future improvement, there is a kind of Equality in Commerce at home & abroad, the result of labor saving inventions, which however beautiful it may

appear in theory, in reducing all to a common level, or a kind of universal joint stock company, has in my humble opinion, already impaired the general welfare. . . . (Leyda, I, 27)

Elsewhere Allan complains bitterly of the auction system of wholesaling. Using this merchandising technique he could undersell all the small businessmen yet make a profit by dealing in large quantities or by playing a waiting game with price averages over a period of time. Prudence under these circumstances seemed to say "if you can't beat 'em, join 'em." Sanguine outlook, or confidence, far from being impertinent, had become the sine qua non of successful enterprise.

The new breed of credit manipulators wished to encourage investors to have confidence in the future. Allan shared their thinking, which was derived from the visible fluctuations of the market in response to confidence or the lack of it in the business community. The notion appears frequently in Allan's correspondence, as, for example, when he wrote in 1819 to Peter Gansevoort of the effect of the annual visitation of the cholera (Leyda, I, 13-14). He expressed the hope that "with the blessing of GOD confidence will soon return & Business revive again. . ." (Leyda, I, 4). In 1823 he discussed with Lemuel Shaw the "uncertainty of European events" and the influence they were having upon business (Leyda, I, 14). That same year he also wrote Shaw expressing his disgust at men "whose interest it is to cry mad Dog at the appearance of a puppy" (Leyda, I, 14). Financiers and merchants knew all too well

the effect that panic could have in collapsing their entire structure of credit overnight. While to men in an earlier stage of the economy faith in Providence might have been a religious duty, during Allan Melvill's career trust, confidence, sanguineness, or whatever the businessmen chose to call it, became business necessities. Once credit financing had invaded the structure of the economy, confidence---the more the better, as it seemed to the businessmen of the time---became a virtue in maintaining the status quo for all concerned, including those people who had never risked a penny in speculation.

Personal credit, so vital to a merchant's success in Allan Melvill's day, depended upon the confidence that creditors were willing to place in a man. Concern about possible fluctuations in this personal credit lay behind much of the ostentation which has worried many biographers as a sign of imprudence in Allan's character. New York City was filled with newcomers whose only character references were their purses. As the New York innkeeper tells Pierre, "though rogues sometimes be gentlemanly; gentlemen that are gentlemen never go abroad without their diplomas. Their diplomas are their friends; and their only friends are their dollars" (Pierre, p. 243). Likewise in the Confidence-Man Frank Goodman charms his snake-like adversary by surrounding him with a necromantic circle of ten half-eagles. With this ritual he "magically" restores confidence (Confidence-Man, p. 188).

In reviewing some of the background and resources for Melville's Confidence-Man, Johannes Bergmann offers the reaction in the New York

Herald for July 11, 1849, to the arrest of real-life "Confidence Man," swindler William Thompson.¹⁴ The article was titled "The Confidence Man on a Large Scale," and its theme is the analogy between the petty confidence game of the watch thief and the large scale finance operations of Wall Street nabobs. The Herald writer declares that the palazzos of the rich "have been the product of the same genius in their proprietors which had made the 'Confidence Man' immortal and a prisoner at the 'Tombs'. His genius has been employed on a small scale on Broadway. Theirs has been employed on Wall Street" (Bergmann, p. 566).

Bergmann reminds us that the Herald article was reported widely and became well-known in important literary circles of New York, receiving comment, for example, in Lewis Gaylord Clark's Knickerbocker. A few weeks later the Duyckincks took up discussion in the Literary World, but with a different angle on the question. The author first asks his readers who does not know the "young confidence man of politics" or the "confidence man of merchandise" among his acquaintances, but then goes on to eulogize a society in which so much confidence of man in man remains that "in spite of all the hardening of civilization and all the warning of newspapers, man can be swindled" (Bergmann, p. 566).

¹⁴Johannes Dietrich Bergmann, "The Original Confidence-Man," American Quarterly, 21 (1969), 562-64; subsequent references appear in the text.

Such philosophizing must have sounded like "double-speak" to the readers of the Literary World. Melville, however, picked up both the satire and the serious wisdom latent in the ambiguity of the discussion. In his novel he develops the more profound side of the confidence man as implied by the somewhat infatuous editorial in the Literary World. Perhaps he was goaded to this perception by a need to justify his father's career and his genuine admiration for the mercantile and the legal mind. He must have been sensitive to such criticism if he recognized "the confidence man of merchandise" in his father or in his brother Allan's clients. His Uncle Peter also participated in such schemes from both the mercantile and the political side. His father-in-law, Lemuel Shaw, was called a "Cotton Whig," though the charge may have been unjust. Furthermore, his older brother Gansevoort had been the very image of "the young confidence man of politics". Allan, Sr.'s, chicanery in promoting confidence to secure investments in his secret partnership was indeed a typical "confidence game," and in it Allan played the double role of endorsing himself to prospective buyers.

When Allan returned to Albany in 1830, he came to Peter Gansevoort as both an insolvent debtor and a family member. In conducting his business enterprises in New York City, Allan had maneuvered himself into the position of a man who stays just within one step of the law. Even so, he had been trading largely upon the family loyalty of the Gansevoorts and of his own father. When

the day of reckoning finally came, hard as it seemed later to Maria in her time of distress, Peter Gansevoort, with the counsel of family friend Lemuel Shaw, firmly resolved to give Allan all that the law allowed in his case, but no more. The settlements that Peter worked out in behalf of the other Melvill and Gansevoort heirs absorbed Allan's losses into the family fortune with the least possible injury to the interests of other family members or to the financial resources of the family as a whole.

Nor can these actions be seen as heartless. Peter had a special appreciation of Allan's difficulties with the treacherous, mercurial economy. First, he was a lawyer and a politician in close touch with the working of the state's economy. Second, in assuming the responsibility of shepherding the Gansevoort fortunes through the changing times, he had ample opportunity to see that the same forces which had proved so baffling to Allan were undermining the carefully acquired estates and assets of the Hudson Valley aristocrats.

In her report, The Gansevoorts of Albany, historian Alice Kenney traces the rise of the family to their position among the Dutch patroons (Kenney, pp. 21-40). According to this study, the Gansevoorts owed their success to a way of life which largely disappeared in the transformation of New York from colony to "Empire State". Albany had been relatively isolated in the days before the west was opened. In that earlier stage the local monopolies

and privileges belonging to the families of the Dutch patriciate were effective means for acquiring and maintaining ascendancy in the community. When Albany became an important trading center for traffic to and from the newly opened west, such local hegemonies became irrelevant and almost impossible to sustain. The influx of strangers, immigrant laborers, politicians, and Yankee businessmen (of whom Allan Melvill was one) still further subverted the internal balance of power in the community, especially with regard to the traditionally closed Dutch social life. Finally, the new boom economy of quick losses and quick gains was also at variance with the patient slow accumulation of wealth typical of the Dutch methods of money-making.

Peter Gansevoort's political career is in itself a study in the kind of setback the patriciate was receiving as an aftermath of change (Kenney, pp. 151-59). Gansevoort began as a member of DeWitt Clinton's party, and he did quite well in it, receiving an appointment early in his political career to be Judge Advocate of the state. The party soon fell from power, however, and eventually dissolved at Clinton's death in 1828, whereupon Peter made the switch into Van Buren's party, but found his prospects diminished. He was useful to the Regency as a lobbyist and a legislator, but he never held any great personal power in state politics such as might have been his had the rising democracy not eclipsed Clinton's authority. After serving three terms in the state legislature and losing a mayoralty election in 1838, Gansevoort

was eventually rewarded the office of First Judge of the Albany Court of Common Pleas.¹⁵ He lost this position in 1846 when another state constitution made the judiciary elective rather than appointive. The sad truth was that Peter, like his leader DeWitt Clinton before him, could not win political support from the democratic electorate. Peter was torn between the patrician tradition, which had sustained his family in the past, and the new conditions of political power in New York State.

Besides unbalancing the political situation of the county, the influx of strangers brought another danger to the old Dutch way of life: intermarriage. Prior to the revolution, Gansevoorts had married, with few exceptions, within the Dutch patriciate. They married Ten Eycks, Van Rensselaers, Cuylers, Van Schaicks, and Van Vechtens. However, with the exception of Herman, all the children of General Peter Gansevoort married outside the Hudson Dutch community. Leonard H. married Marie Chandonette, who had been reared among the Dutch, but who was of Philadelphia French extraction. Peter married

¹⁵ The New-York State Register for 1843, ed. O. L. Holley (Albany: J. Disturnell, 1843), p. 357; this same almanac shows Gansevoort Melville listed as one of the Examiners in Chancery for the County of New York (p. 387), also marked as a new appointment; and in the list of attorneys for New York City there appear, in addition to Gansevoort Melvill (sic) and his friend Alexander W. Bradford, the names of J. B. Auld (p. 391), Evert A. Duyckinck (p. 393), Pierre M. Irving (p. 395), and Cornelius Mathews (p. 396), all primarily thought of as literary men.

first a Lansing and then a Sanford, neither of whom were of the Hudson Valley Dutch, although their families were prominent in the state. Maria married Allan Melvill, a Yankee of Scottish ancestry. A fifth child, Wessel, never married. The children of these marriages in their turn also made marriages outside the Dutch patriciate. The result was a dissolution of family loyalties and a breaking away from the old ways of life. Kenney argues that disparity of values and backgrounds in this generation produced neuroses in the next. She mentions Henry Gansevoort and Herman Melville as two specific cases in point (Kenney, p. 214).

Changes in economic conditions between 1790 and 1830 were uncongenial to the slow but sure Dutch process of accumulating wealth over generations. In fact, during the depression years which followed the Panic of 1837, the family fortunes came close to entire collapse. Peter was burdened with obligations he was finding nearly impossible to meet. He owed over \$70,000, part of which was a joint responsibility with Herman (Kenney, p. 202). Catherine Gansevoort had died in 1831, and the estate could not be settled because of various complications preventing the completion of the Saratoga County surveys. Peter's wife, Mary Sanford, was due an inheritance from her father, but that estate was long in being settled too, and it would be years before Peter would realize any cash from it. In the fall of 1840 the brothers nearly lost Stanwix Hall because the creditors refused to allow Peter time

to find four thousand dollars which was demanded (Kenney, p. 202).

Meanwhile, the other heirs of Catherine Gansevoort, especially the children of Leonard H., were pressing hard for a settlement of the estate. By 1840 Catherine, Leonard's only daughter, brought suit against Peter and Herman at the prompting of her husband, lawyer George Curtis, who felt that money due his wife was better placed under his control than in the hands of her uncles. Peter took advantage of all the delays the law would allow, and Gansevoort v. Gansevoort dragged on for nearly six years before it was finally settled (Kenney, pp. 208-209). By that time business had improved, the value of the land was up, and Peter managed to escape the sure destruction that would have been his had he been forced to settle the estate any earlier.

When the Court of Chancery ordered Peter and Herman Gansevoort to pay their sister and niece sixteen thousand dollars, Peter escaped having to pay his share because Maria's debt to Peter already amounted to more than her share of the estate. Herman, on the other hand, had no such reprieve, and the whole burden of paying Leonard's insistent heirs fell upon him. When Herman could not raise the cash to make the settlement, Curtis sued again, secured a judgment, and sent the sheriff to put Herman's properties and possessions on the block, an outrage for which Herman's wife Catherine never forgave the Gansevoorts (Kenney, pp. 209-10).

Thus, as Kenney concludes, "the Gansevoorts flung their fortune into the gamble of American development and lost the larger

part of it" (Kenney, p. 210). The figure who emerges most unscathed was Herman Melville's Uncle Peter. He, as it turned out, was the best equipped by his legal training to pilot his own fortunes and those of his divided family through the breakwaters of the new economy and the shoals of the waning tradition which had buoyed up family success in the past. While Allan Melvill and Herman Gansevoort were confronted by the law as the necessary limit to their conduct and their enterprise, Peter was able to assume mastery of the law as a means for protecting his interests and for engineering results most equitable for the welfare of the family as a whole. His shrewd manipulation of legal processes enabled him to act with regard to future benefit as well as present advantage. The ethical dilemmas and changing times which had so baffled Allan were resolved for Peter through his law practice and his legislative career, both of which gave a broad experience of the larger currents of change. He was able to participate in forming channels which regulated matters larger than his own interests. It was this "cosmopolitan" overview which reconciled Peter to expediency in the face of temporal exigencies and to the law as a time-tested but flexible tool for adjusting conduct in situations not adequately covered by the slow changing mores.

After Allan's death Peter assumed the role of father to Maria's children. He was assisted occasionally by family friend Lemuel Shaw. Both men were lawyers and judges; both were successful in contrast to Melville's own father. It is reasonable to

suppose that the young Herman Melville had as much to learn about coping with the world from the success of these surrogate parents as he did from his father's frustrations.

One of the first principles that Melville derived from the experiences of these men was that the world he lived in was not the same from one place to another. This perception is precisely the jurist's point of view. One's obligations are conditioned by circumstances and values in force wherever one finds oneself, as much as by any concepts of the ideal. The idea was later reinforced by Melville's own experiences as a sailor and by his fellowship with avant garde New Yorkers who had a strong sense of ongoing change and development. Melville saw that the differences in standards of conduct between times and places was a source of conflict and dilemma. These discrepancies furnished real ambivalence on the one hand, and on the other hand, opportunity to further one's own interests---whether they be for selfish personal gain or for the success of some good cause.

Melville made the juxtaposition of two different worlds, each valid in its own way, the characteristic setting of his stories. The values and ethics of these two worlds then conflict with each other to a greater or a lesser degree. His protagonists find themselves torn between the claims each world makes upon his heart, experiencing crises of moral dilemma arising out of real ambivalences of the betwixt and between position. Melville portrayed characters

who find their notions of right and wrong challenged by a change of circumstances. When faced with this kind of dilemma, his heroes often resort to a legalistic analysis of their predicament as an expedient way out of their quandary.

Melville's career began, nominally at least, as a writer of the fictionalized travelogue. Although he soon outgrew the genre, he found so much capital to be made out of moving his protagonists through widely contrasting settings, that the device became almost a convention of his stories. These multiple settings usually represented two or more different and somewhat conflicting worlds. The protagonist typically found much that was equally valid in each of the microcosms, thus creating for himself a set of puzzling ambiguities about the nature of the universe, or, still worse, embroiling himself in ethical dilemma. In these crises, moreover, the hero seems to lose a sense of security in his own ethical identity.

In Typee the novel opens with the young sailor's exposition on his surroundings. He has been at sea for six months and asks the reader to imagine what it must be like to grow so detached from his homeland. Within pages the ship enters a tropic lagoon and comes to rest at the shore of a strange and inviting new world. While the ship lays in its harbor, the young man has ample opportunity to compare civilization as he knows it with what he sees of native life. By the time he is finished with the comparison he is in doubt

as to which side has come out looking better:

How often is the term "savages" incorrectly applied! None really deserving of it were ever yet discovered by voyagers or by travellers. . . . It may be asserted without fear of contradiction, that in all the cases of outrages committed by Polynesians, Europeans have at some time or another been the aggressors, and that the cruel and bloodthirsty disposition of some of the islanders is mainly to be ascribed to the influence of such examples.¹⁶

After placing the French admiral side by side with the naked old patriarch-sovereign of Tior, he concludes his reflections by asking "insensible as he is to a thousand wants, and removed from harrassing cares, may not the savage be the happier man of the two?" (Typee, p. 29). These thoughts neatly dovetail with a discussion of his own miserable condition on board the ship. In short order his own devotion to industry and the obligation of his contract with the ship master are called into question. He wants to leave the ship and see whether the savage life might be happier than his own life on board the Dolly.

The ethics of his situation are at first unclear. He has indeed signed the ship's articles, thereby "voluntarily and legally binding" himself to the period of the voyage. He must leave the

¹⁶Herman Melville, Typee: A Peep at Polynesian Life, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston, Ill.: Northwestern University Press, 1968), p. 27; subsequent references to this edition appear in the text.

vessel clandestinely. He must become a fugitive, for whom the captain would surely offer a reward. He is going to "run away." Such conduct will not give him a flattering character. All of the values of his own civilization seem to condemn his actions. Yet his life on board ship is unendurable to the point that he would rather risk his fortune among the happy, carefree but treacherously undisciplined natives. At the same time, he does not wish to appear as though he is acting dishonorably.

"Tommo," as he comes to be called, wastes none of the reader's attention in a portrayal of the actual dilemma. He rather implies his predicament in the comparison of his own condition and that of the natives, presents the reader with his resolution, and then asks him to judge fairly whether he acted in bad faith. The resolution itself, we may note at this point, is couched in the terms of a legal analysis of his obligations, which he has reduced to the letter of contract in the ship's articles (Typee, pp. 20-23).

Melville repeats the plot device in Omoo and again in the opening chapters of Mardi. Once more the protagonists are attracted from the unprofitable confines of their ships, which prove to be the links to their own world and to their civilized identities, to the carefree life of the lush tropic isles. They dissolve their obligations to the one world and justify their passage into the other by a series of legalistic maneuvers which removes guilt and responsibility for their irregular conduct.

In Mardi, however, Taji is faced with an additional quandary. Sailing the open sea he encounters the canoe of the priest Aleema, who has in custody the white maiden Yillah. Here again the ethics and values of two different world conflict. By the standards of Taji's background a crime is being committed. The girl is in white slavery and is destined to be sacrificed to a heathen god. Far from seeing his actions as a crime, the priest believes that they are consecrated by the highest ideals of his society. Taji yields to the powerful impulse to protect the young woman. After the fight begins the priest's actions threaten Taji's life, and he reacts instinctively, killing the priest. He has acted in what he thinks at the time is a just cause and in self defense. Later, upon further examination of his conscience, Taji finds cause to suspect that his real motive in wanting to free the girl was selfish personal desire. The religious devotion of the avenging sons, coupled with strong indications that Yillah may not in fact have been of Taji's racial or national origins at all, undermines justification for his actions. Throughout the rest of the novel he must debate whether he has been guilty of murder or a justifiable homicide. The answer seems to lie with girl herself, but she cannot be found. What is significant, however, is that Melville apparently wishes his readers to entertain the possibility that Aleema and his sons were doing no wrong to the girl in the first place.

Plot devices in other works also demonstrate Melville's

perception that values and ways of thinking differ widely from one time and place to another. His fiction depicts the world the way a lawyer would see it. Redburn finds his way through no less than four contrasting settings before the novel ends: he comes from the country to the city; from the shore to the bewildering world of the ship; from the ship to Liverpool; from Liverpool to London and back again in reverse order until he returns to New York City. Ishmael constantly compares the differing values of the shore and the sea. Pierre is nearly in shock at the differences he finds between the city and the patriarchal countryside, and poor Israel Potter! he is shuffled from one country to another, from ship to ship, from shore to sea, from countryside to city, and before his story is over, through time as well, from one era to another.

In Bartleby, "Benito Cereno," the Confidence-Man and Billy Budd, Melville is in firm control of the notion of a universe pluralistically divided into different orders of reality. He delineates multiple systems of values within one society and within one man's life. The contrasting settings are absorbed into the larger idea of several possible worlds existing simultaneously in one's mental concepts and in the reality external to the individual as well. Bartleby and the Master in Chancery, for example, bring together in conflict two private worlds, each with an integrity of its own, each existing simultaneously in the same room. In "Benito Cereno" the operative values of the microcosm in Don Benito's ship are kept alien and hidden from Captain

Delano, who only gradually suspects duality in the world he has been engaging. In Billy Budd, Captain Vere weighs at least three systems of valuation by which Budd may be judged, as a man, as a citizen, and as a soldier, choosing the one most expedient to the situation at hand. He establishes Budd's ethical identity out of the several alternatives available, according to the end he had in mind.

If the first lesson that he learned from lawyers he knew was that the world was not the same from one place or time to another, the second observation Melville may have gathered from watching his elders was that the lawyer is provided better than other men with a philosophy and a methodology for coping with such a fragmented and ambivalent reality. The lawyer's outlook is pragmatic out of necessity. He knows that the world will not stay suspended in limbo while men dally forever with their scruples. Yet his solutions are not unscrupulous (though indeed his ends may be), because they enjoy the sanction of the law. The legal approach recognizes the simultaneous existence of separate systems of valuation, (in the matter of jurisdiction, for example). The law further provides one with a methodology for analyzing experience so that a practical guide to conduct is available and so that an "ethical identity" may be established for a particular situation at hand. The lawyer even has a set of rules for determining factual truth in a situation.

Given his Uncle Peter's demonstrated success in disentangling conflicting interests and in resolving dilemmas for the equitable benefit of all concerned, it is little surprising that Melville should have portrayed his characters as turning to legal analysis of their situation when faced with an ethical predicament. In this way they expedite a choice of "ethical identity" and absolve themselves of obligation to conflicting ambivalences.

Although Melville was not a lawyer, his thinking was similar to that of a lawyer in some respects. Just as a lawyer must first establish the legal identities of the various parties and factors of a case, so Melville establishes an "ethical identity" for the elements of a situation. The "ethical identity" of a character refers simply to the role he assumes as defined by one among many possible systems of value. Used this way, the term is not precisely legal, but philosophical. Further, as long as Melville can suggest that a man may have several possible alternative ethical identities, ambiguity about right and wrong will always remain in his decisions.

In like fashion, the term "system of value" is used in preference to legal terms like "jurisdiction," or lex fori, etc., to be able to denote factors as various as the mores of a culture, the law of a particular place or class of affairs (such as the maritime law, the mercantile law, the civil and penal codes, etc.), widely differing schools of philosophy or religion,

the terms of a contract, relationships between persons, the dictates of a specific activity, such as running a ship, maintaining martial discipline, or developing capital and resources. Melville handles these materials with a lawyer's appreciation of their simultaneous existence as a source of advantage or dilemma. He has a tendency to allow his protagonists to analyze their dilemmas in a way that a lawyer would analyze them. He makes an attempt to settle the precise ethical identity of the character preliminary to making a decision about his conduct. Thus, in Typee Tommo is first reduced to one of two parties to a contract made under a specific body of law; later he is identified as a guest of the natives, and therefore liable to being pressed into service for the defense of the society in which he is temporarily claiming shelter. Israel Potter moves from one navy to another, remaining unsure about what he ought to do, until circumstances permit him to step boldly forward and declare, "I am an enemy, a Yankee, look to yourself" (Israel Potter, p. 116). With his ethical identity secure, swift, decisive action is possible.

Some of Melville's characters are adept at perceiving alternative systems of value and in exploiting their discrepancies by making claims under whatever system or jurisdiction best suits their purposes. At first such characters are shown merely using their situation for their own selfish interests. In the later works, however, this type becomes the "cosmopolitan," who seems best equipped among men to advise others trapped in a quandary.

The cosmopolitan's counsel is to rise above the limited perspective of the individual's immediate interest and seek truth from a vantage point which can entertain the relationship between the highest ideals and all the imperfect systems of value which arise to adjust that truth to the exigencies of time and place.¹⁷

One of Melville's familiar devices was to create a character who finds himself in a position above the law of a specific situation. Closer examination of Melville's renegades and outlaws shows relatively few characters who are "outlaws" in the sense that they deny responsibility to any law whatsoever. The more usual case, including all those characters which Melville holds up for any share of admiration, are in a position to perceive that the law varies from time to time, from place to place, and even from circumstance to circumstance. Law might not be ignored, yet it could stand a little jockeying now and then.

The character's response to this situation is not just the simple "when in Rome do as the Romans do," as practiced by the young sailor in the Typee valley or by Israel Potter in foreign navies, but also the more sophisticated reaction of Taji in Mardi, who declares himself above the petty restrictions imposed upon the citizens of each of the islands he visits. Jack Chase, the noble captain of the foretop in White-Jacket, switches navies without

¹⁷Melville, The Confidence-Man, p. 164, 197-99, 238-39, 251, and 257-60.

troubling his conscience, because he feels his actions are in accordance with a higher ideal than mere chauvinism. Benjamin Franklin occupies a somewhat ambiguous position as the envoy of a revolutionary government. Many of these characters make decisions to act with prudence towards the laws of the time and place in which they find themselves, all the while reserving their final allegiance to their own best interests or ideals.

The character who is best able to achieve this cosmopolitan relationship to the law may have ends in mind which are either good or bad in the opinion of the reader. Ahab juggles his actions to avoid the charge of usurpation and still control the ship for his personal interests. Captain Vere guides the courtmartial to the verdict he has already determined is necessary for political reasons. Franklin freely participates in illegal activity for the sake of his patriot cause. In Omoo the protagonist joins his rebellious shipmates in resisting the authority of the consular hearings, feeling justified within the maritime law and the customs of the sea, which he sees as above the corruption of one remote judge. These characters have in common a sophistication about the law which enables them to use it as a means to arbitrate the conflicts between one's individual interests and one's duty to the rest of society. Melville was inclined to allow his characters to make a "legal" analysis of their situation before making the decisions that move the action. At times these are also attempts at retro-

spective justification for their actions. Further, he began to develop the character who gains enough perspective to see the necessity for pragmatic relativism. Such characters are able to make decisions which arbitrate conflicting though equally valid interests.

From the beginning Melville makes a distinction between the legal and the moral character of an act. The relationship between legality and morality changes and develops in his work, yet the distinction between the two persists. It is necessary then to attempt some definition of what he thought of each and to make a few preliminary remarks about their basic relationship to each other.

Morality is the more difficult of these two terms to define because it is the less precise, both in common usage and in Melville's work. In the simplest terms morality refers to the generally accepted customs of conduct and right living within a society, and to an individual's practice in relation to these. The qualifying terms of this definition are in the words "generally accepted". For an author this standard would apply to the readers he is addressing. He must play to what they "generally accept" as right conduct. In Typee, for example, Melville quite consciously defers to his readers' standards of conduct in making his hero apologize for running away and in his careful presentation of Fayaway. This process is repeated in Omoo and Mardi in which the sailor protagonists go through

an elaborate justification of their actions for the readers' sake. This deference to the "generally accepted customs" persists to some degree in his work despite his miscalculation, especially in Pierre, of the intellectual license he was to be permitted in the matters of religion or social example.

Melville was anxious to show two things about those customs. First, they are not entirely consistent within themselves even in the same society. Second, they are not always adequate to every situation. When the latter is the case, morality requires assistance from another quarter, and the rescue is often performed by the modus operandi of the legal profession, requiring both definition and dialectical argumentation.

Others, however, would assign the term "morality" to internal standards of conduct, those sanctions which arise from the "character" or the "heart". Morality in this sense refers to what is called one's private conscience and concerns the inner thoughts and feelings attached to one's conduct. Because they are internal, these elements cannot be observed except by inference, inconclusive, from the deportment. Legality, when contrasted to this definition of morality, is an external standard; i.e., one socially, formally agreed upon and pertaining to an individual's overt, observable behavior. In Melville's era, the age of sentimentality, jurists debated just how far the operation of morality taken in this sense ought to intrude in determining the merits of cases. Melville made this question

one of the primary issues of *Pierre*, *Bartleby*, and *Billy Budd*.

The "legality" in Melville's work manifests itself in two ways. The first pertains to the meaning of the word in common usage. Legality in this sense refers to the degree to which a situation conforms to the letter of the law; and once in a while Melville outlined the legality of a situation in this way. The second sense, however, involves the approach that the science of the law takes in analyzing a set of circumstances. These procedures take into account alternative systems of valuation and recognize, from the judicial point of view, the need to choose among them for the one most appropriate for doing justice to the individual's interests in conjunction with the broader purposes of society. Truth under these procedures is always seen as relative and conditional.

The law itself is limited to a narrow choice of valuing systems, namely those spelled out as being the special province of the law. But the legal approach, as an intellectual discipline, may be brought to bear on other systems of value as well, in philosophy, in religion, in sociology. It is important to note that Melville was trained intellectually by lawyers or by men with a legal education and that he shows a readiness to employ their characteristic approach to the analysis of ethical problems.

Part of the political sophistication that Americans gained during this formative period was an appreciation of the distance

between what was fair or right in a moral way and what the law allowed. Lawmakers were sensitive to these discrepancies in the relationship of the law to the mores or to commonly accepted religious teachings, and they came up with a rationalization for the problem. Controversies which fill the law journals and court records abound with what lawyers were pleased to call the difference between what was mala in se, that is, evil in itself, and what was merely mala prohibita, that is, not evil in itself, but prohibited by law for reasons of expediency or for the general welfare. In defining what was mala in se, reference was often made to common morality and to an established concept of natural law as a temporal expression of divine law. As the 19th century wore on, however (and the process continues even more in the 20th century), item after item of what was considered mala in se has been recognized as being merely mala prohibita after all.

The change was due in part to the pressure of the times, in part to the increasingly acceptable notion that the law was less divinely inspired than humanly invented, and as such somewhat arbitrary and malleable. Lawyers and lawmakers, while not alone in this perception, were certainly at the fore in formulating and using the principle that the law ought to be flexible enough to meet the needs of a fast-changing, complex society, and that law must often take over where mores, which take some time to develop and become established, are inadequate to meet the pressures

of the situation. The distinction between mala in se and mala prohibita was promoted primarily to give jurists room to tinker with the law without rending the fabric of society.

X Melville had first-hand experience of the attempt to engineer morality by means of the law in his father's struggle to make an "honest" living, in his uncle's work on legislative committees, in settling family estates, and later in arbitrating cases as a judge. The insight was reinforced by his own South Sea experiences among the missionary infested islands, where it became plain that the law was an extremely artificial overlay promoted for the ulterior purposes of one interest group or another. Later, the idea that the law was malleable was further developed as he came to know Lemuel Shaw and many others involved prominently in politics, journalism, and law reform.

The distinction between legality and morality is expressed frequently in his work, giving evidence that he was familiar with the principle and used it at times as another source for creating doubt and conflict. Often the person who resorts to the legal estimate of a situation is presented as being something of a pettifogger, or worse, a sea lawyer. At other times the legal analysis is presented as being necessary because of the inadequacy of generally accepted customs. If a situation is genuinely uncertain, ambiguous, or ambivalent, one is safest in using the approach a lawyer might make in analyzing the problem and finding a solution.

The result may never be noble, may never fathom the deepest limits of reality, but on the other hand it will not be foolish and it need not be knavish.

In the opening section of Mardi Taji finds his captain has decided to take the whaling ship to the North Seas for an undetermined period of time in the cold clime. He goes to the captain and reminds him that they have a contract which does not include such a voyage at all. The "sea lawyer" has a point. Technically the ship's articles were supposed to include a statement of the ship's destination, a legal fact that one can infer that Melville knew. The joke is that while this was the law, no one, least of all a common sailor on the high seas, would dare approach a whaling captain with such a challenge. Melville makes the joke more explicit in Redburn.

The law goes on to say that if the destination were changed the captain has an obligation to release the sailor at the first point of call. The captain in Mardi agrees, but points out there is no probable port between them and the arctic regions. He facetiously extends his permission to the sailor to leave the ship if it is possible. On this basis the sailor makes his decision to leave the ship in mid-ocean. Pages later, in mulling over his desire to get Jarl, another mariner, to go along with him, he reflects, "I had many misgivings as to his readiness to unite in an undertaking

which apparently savored of a moral dereliction."¹⁸ Note that Melville does not say that it was a moral dereliction, but only that it "savored" of such. He considers his own resolution "quite venial". Justified within the law, he is nevertheless still guilty by the lights of custom, or generally accepted standards of conduct.

In Redburn, the boy hero finds that there is a difference between what morality would seem to require in treating the immigrants or in rescuing the starving mother in Liverpool and what the law required. In the latter case, local custom actually condemned the people to starve. In the former, both law and custom failed to protect the poor while they were crossing the ocean. Evidently Melville also perceived a higher morality, an absolute or ideal morality above whatever local formula held sway in actual practice.

Other instances in Melville's work demonstrate his awareness of this distinction between law and morality. In Omoo the narrator shows how the missionaries work mischief by making statutes which run counter to the native mores.¹⁹ Ahab is careful to keep his actions within the letter of the law, yet he is violating common

¹⁸Herman Melville, Mardi, and a Voyage Thither, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston, Ill.: Northwestern University Press, 1970), p. 16.

¹⁹_____, Omoo: A Narrative of Adventures in the South Seas, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston, Ill.: Northwestern University Press, 1968), pp. 172-92.

morality in endangering his ship and crew and, if Starbuck is right, in seeking "vengeance against a dumb brute". In each of these situations Melville shows characters exploiting the power of the law for private advantage.

At other times, and I believe, ultimately, Melville had real admiration for the man whose "cosmopolitan" outlook enables him to take care of himself in a complex and baffling world. In the minister Falsgrave and the philosopher Plotinus Plinlimmon, in Benjamin Franklin and those he says are of the same type, Jacob, Hobbes, and Machiavelli, one finds the forerunner of the Confidence Man, a point to be discussed in more detail in a later chapter. Such masters of reality may use their powers for good or bad, and they can do so on a level unavailable to the man trapped by convention or to the man who tries to disregard convention altogether. The ability to rise above rules yet know their value in arbitrating the conflict in temporal conditions is the kind of tricky and dangerous game only great men attempt with impunity. Such is the position in which the judge finds himself when he must try to find a just or equitable solution in a world where good and bad are relative values hedged by opposing interests and real ambivalence.

Moreover, Melville calls all of these characters "practical philosophers" (Israel Potter, p. 60), a phrase which describes equally well the legal thinker. Such men have a healthy respect for the law, and most are lawgivers themselves, Franklin, for example,

with his maxims, Plinlimmon with the rules of his society. All seem devoted to the notion that though any one temporal expression of the law is as imperfect as anything else in this world, yet it is true, as legal philosophers throughout the 18th and 19th centuries were fond of arguing, that "there is no equity without law". These wise men were not so much governed by the law as governing with it, and the ideal man in Melville's work, despite the author's own inability to accept him fully, is he who possesses the attributes admired in the greatest judges.

The next chapter explores in more detail the hypothesis that Melville learned certain habits of thought from men he knew and respected among the lawyer class. Further review of biographical details clearly demonstrates that Melville's intellectual and social life was indeed dominated by lawyers, judges, political journalists, and literary men who had had a legal education. The subculture of the law that he shared with these men dictated certain characteristic selections of theme and form. It is also possible that it was the basis for much of his adaptation of contemporary philosophy.

Chapter II

The Influence of the Legal Mind

While Melville was growing up burgeoning economic complexity made the lawyer indispensable. In a former age merchants had been able to draw up their own contracts. They avoided lawyers except in extraordinary cases. In time, however, the Industrial Revolution introduced intricate methods of financing which made trading more difficult than it had been for the sedentary merchant of the 18th century with his over the counter transactions of goods or hard money. Businessmen in the new era had to write contracts which not only conformed to the general usages of the lex mercatoria but which were also standardized in form and phrasing in order to prevent litigation over "loopholes". In a short time a lawyer was needed to keep business both legal and profitable. The merchant princes then acquired their "chancellors," but the average man of business, whose funds for legal aid were more limited, had all he could do to keep up with the legal technicalities.

Allan Melville was among these smaller businessmen who had to provide themselves with at least a working knowledge of the law. He displayed familiarity with its jargon as well as a dis-

trust of its artifices in this letter to his brother-in-law

Peter:

Dear Gansevoort: Your letters of the 15th & 16th inst are on file unanswered, the first, however, being a severe tirade or phillip against two of the gentler sex, both prodigious favorites of mine & one of them in my eyes at least "a seeming Paragon," . . . you will permit me in comity to glance over with dry acknowledgement, which must not however be construed into a tacit acquiescence in its propriety, for nothing legal in the whole course of your practice, in fact or argument, could have been more manifestly improper as it regards the aforesaid fair Ladies, & in this case as Counsellor, silence must in no wise be tortured by law logic or professional ingenuity into consent, which it by no means implies, and I do here most solemnly protest, & beg you would enter the plea on your official record, against the injustice & indecorousness of a most outrageous¹ fulmination, which nothing could extenuate,

It is important to note the disapproval reflected in these caustic references to Peter Gansevoort's "law logic" because less than ten years later Allan himself was forced to resort to a similar code of ethics when business failures drove him from New York City. By then Allan was glad to use Peter's legal competence to aid him in making an orderly retreat. On the eve of disaster he wrote Peter frantically inquiring whether he might be sued in more than one place for the same debt, or whether he might

¹Eleanor Melville Metcalf, Herman Melville: Cycle and Epicycle (Cambridge: Harvard University Press, 1953), pp. 6-7.

retain use of furniture which was to be delivered up to another creditor.²

Although Allan's knowledge of the law evidently had its limits, he was probably as much at ease with its language as every other man of his milieu. Familiarity with legal parlance was as popular in early Victorian times as, say, the jargon of Freudian psychology is in our own. The man who spouted law terms at the drop of a hat had been a source of caricature for novelists such as Fielding and Smollet and a host of their imitators throughout the latter half of the 18th century. In the 19th century, however, legal phrases had become so much a part of "modern" times that its use was a commonplace not only in the homes of the prominent bourgeoisie, but in humble dwellings as well. Alexis de Tocqueville noted about American speech, "the language of the law becomes in some measure a vulgar tongue, . . ."³ Most popular magazines throughout the 1840's and 1850's contained frequent articles explaining aspects of the law. Charles Dickens was able to chat freely with his reading public about all manner of legal chicanery and to include essays on the subject in his periodical Household Words. Newspapers

²Jay Leyda, The Melville Log: A Documentary Life of Herman Melville, 1819-1891 (New York: Harcourt Brace, 1951), I, 44.

³Alexis de Tocqueville, Democracy in America, ed. Phillips Bradley (New York: Vintage Books, 1945), I, 290.

sometime during the late 1830's began to run minutely detailed accounts of trials, curious civil decisions of no particular importance, as well as the understandably more sensational criminal cases. These accounts often included the entire speech of the defense or the judge's charge to the jury, besides a legal analysis of any controversy over obscure points of law. Finally to fill a real need in public education, the home library of the middle class was supplied with numerous handbooks purporting to explain the law to the lay public.⁴ Usually these popular textbooks carried a vocabulary of legal terms in the back.

How much of this legal lore wore off on the children growing up in such an environment we can only guess; but in 1849, even Allan's youngest, Augusta, could facetiously pen a "legal letter" to her grandfather Shaw:

And these few lines are to certify that the debt to which the Chief Justice stands creditor, has been canceled by the payment of thirty five good and substantial kisses, satisfied, imposed upon, and delivered to one Malcolm Melville, at such time, place, and manner as the mother of said Malcolm did appoint, permit and direct. Also the usurious interest demanded and insisted upon, by the payment of thirty five more, of a gentle and very delicate nature, which were impressed and given to one Maria Melville, the youngest of that name, at the time, place, and manner, the mother

⁴For example, Asa Kinne's Questions and Answers on Law, alphabetically arranged; with reference to the most approved authorities (New York: n.p., 1843-1855); at least ten handbooks of this kind may be found listed in the Library of Congress Catalogue for 1861.

of said Maria did permit and direct. And this, is in full satisfaction of all pecuniary debt due to the Chief Justice of the Commonwealth, from me, the said Augusta from the beginning of the world to this day. (Leyda, I, 314)

Herman was among the witnesses signing this instrument before it was forwarded to Judge Shaw.

Apparently it was difficult to remain unaffected by the legal atmosphere that crept into the households from the professional men themselves, despite protests that they wished to separate the home and the office. Like the playful Augusta, Melville's wife, Lizzie, also worked this vein of wit, writing to her stepmother, for example, in December, 1847, "Thank you, dear Mother, for your nice long letter. I was beginning to be afraid you had forgotten your part of the contract for that week, but Saturday brought me evidence to the contrary and made us even" (Metcalf, p. 48). Among those of the upper middle class the rudiments of law and of legal terminology was common enough to be considered part of a gentleman's or a lady's social equipment.

Herman Melville himself is known to have engaged in the kind of picayune and equivocating debates which the popular mind conceived to be a display of "law logic". During his well known quarrel as "Philologos," he was accused by the opposition of being "like a wary pettifogger". It was alleged that Melville liked to equivocate or to espouse, as was politically desirable, either side of an argument (Leyda, I, 69-79). Apparently he was more than

able to compete within this debating society in Albany, made up of artists, teachers, young merchants, and lawyers.

Melville's youthful inclinations, as recorded by his father, were for commerce (Leyda, I, 43). In school he studied with this object in mind. Nowhere has it been found that a course in business law was included in any of his formal curricula, but during his tenure as a clerk in the Albany State Bank, his mother, Maria, wrote her brother an interesting note in which she asks if her son has kept up with his reading and whether he has made himself useful by writing (Leyda, I, 56). Was Herman working as his Uncle Peter's law clerk? Herman's undergraduate studies were no doubt continued under the supervision of Judge Peter Gansevoort, and there is every reason to suspect that the elementary principles of law would have been among the subjects this "Dutch Uncle" felt it necessary to teach a young businessman.

Melville's ability to handle legal terminology has been amply demonstrated by Herbert F. Smith in "Melville's Master in Chancery and His Recalcitrant Clerk".⁵ In that article Smith shows how Melville made use of the historical development of the Chancery Court in his symbolism and how he used legal terms to make puns on the action in the story. Melville used law jargon frequently

⁵ Herbert F. Smith, "Melville's Master in Chancery and His Recalcitrant Clerk," American Quarterly, 17 (1965), 734-41.

in his work, for example, the tale in Mardi of the awful Plujii, and in Pierre's reflection at the end of the novel upon Isabel's unreliability. Further examples are in chapters of Moby-Dick such as "The Advocate" or "The Affidavit" and in sections like "Heads or Tails" and "Fast Fish and Loose Fish". Other instances to be found in his work are too numerous to list here.

Despite this demonstrated fluency in the language of Wall Street and the courtroom, Melville never followed through with a career in business. His inclinations for commerce must have been considerably dampened after he viewed the crushing experiences of his father and older brother, Gansevoort. His mother's loss of capital in the fur cap business and the pressing nature of family finances precluded everything from Herman's prospects but a long, arduous rise as a junior officer in one of his Uncle Peter's or Uncle Herman's enterprizes. Both men had been retracting their business empires, as we have seen (Chapter I), starting with the Panic of 1837 to the settlement of Gansevoort v. Gansevoort in 1846. During this time Peter was acquiring heirs of his own and desperately trying to preserve his crumbling estates. He may have grown less willing, considering too his unfortunate experiences with other Gansevoort heirs, to extend unwarranted generosity to Maria's children. One indication that this was the case comes down to us in Allan, Jr.'s remarks in 1839 that he had quarreled with his uncle because Peter did not wish to be burdened with his

sister's children any longer (Leyda, I, 85). Herman's choices in 1839-40 were, like those of his brothers, either to follow a self-made career in the law or to find something else to do to make an honest living.

Both Allan, Jr. and Gansevoort did become members of the New York City bar; but Herman, like the romantic Pierre he was later to describe, never yielded to the temptation to become a law clerk. His exasperation with the politicking and "utilitarian transcendentalists" of young lawyers comes out more or less explicitly in Pierre. He satirizes the legal profession more than once--- "Sorcerers of Minda" in Mardi, for example---and in his reference to the brown shark as a sea-attorney in the same work. In Moby-Dick, "The Advocate" is a take off on the public relations job the members of the bar were constantly publishing to promote the image of the lawyer. (There was one published in the Literary World during the spring of 1850 while Melville was writing the whaling novel.)⁶ In Bartleby his portrait of the well-meaning but somewhat foolish lawyer is really anything but flattering to the profession. But the lawyer in propria persona does not appear often in Melville's work; and it is to other broader elements, such as outlook, philosophies, and methodology that we must look in order to find the significant influence of the law in his writings. It is, in other

⁶"The Bar of New York," The Literary World, 7, No. 4 (1850), 65.

words, the influence of the legal mind that is the focus of our study.

For his brothers, Gansevoort and Allan, the return to New York City was like the return of the avenging sons. Both were determined to meet head on and conquer the forces that had undermined their family prosperity in the past. From the evidence of his journal, Gansevoort seemed to have inherited much of his father's romantic nature (Leyda, I, 60-62, 114, 132-33, and 213-14) and had been badly scarred by his own youthful gamble on the wheel of fortune. As a result, he rapidly succumbed to the demands of this idealism. Having studied law with his friend Alexander Bradford and having passed the bar exams, Gansevoort turned from practice to Tammany politics. He had received an appointment as an assistant in Chancery in 1843, evidently on the coattails of his Uncle Peter's appointment as First Judge of Albany County in the same year. Shortly thereafter, he became more and more involved in a barnstorming campaign for Polk. The Polk campaign, it should be remembered, was conducted in the teeth of Van Buren's last bid for power. Because of Polk's position, Gansevoort's activities in his behalf were in the way of biting the hand that fed him, in as much as Peter's connections were at the time with the Albany Regency. Gansevoort's hopes came to quick disillusionment when he received for his efforts a less than satisfactory appointment as attache to the London embassy.

Possibly because of his youth at the time, Allan escaped his

older brother's problems of emotional instability no doubt brought on by the agitation of family affairs. More cautious and prudent, he settled into being a Wall Street lawyer and spent his days preventing and solving for merchants and financiers the kind of problems that caused his father's collapse. More nearly a product of his uncle's upbringing, Allan was able to accept the smooth rationale of business ethics aggressively promoted in New York City. Like his father he made a good marriage and like his uncle he made a lawyer-like acceptance of the world.

Standing between them in age, Herman occupied a position between the extremes of their philosophies. Touched with Gansevoort's idealism, he was never able to throw himself wholeheartedly into its pursuit. Yet unlike Allan he was unable to accept a glib explanation for the world. Although he was never pressured as Gansevoort was to be eminent, he could never accept the plodding path most congenial to Allan. Yearning after a romantic vision, Herman Melville was nevertheless vulnerable to the claims of a bustling secular reality which he did his best to keep at a safe distance.

Rather than make one more in a great roost of law clerks in New York City, such as one he described in Pierre (pp. 266-67), Melville signed on for a short cruise before the mast to Liverpool and back. When he returned he made a trip to the midwest with his friend, James Eli Murdock Fly, who later used his connection with Melville to become a law clerk himself. After visiting his Melville

cousins and seeing his Uncle Thomas trying to scratch out a living as a justice of the peace in Galena, Ohio, Herman returned to New York apparently in less of a mood than ever to follow his brothers' footsteps. After another brief try at teaching school, he signed on board the Acushnet in search of a simpler more romantic life in the South Seas, thus following the nautical tradition also present in his family.

Melville to our knowledge never had any formal training in the law. What information he had, especially before living in New York City and marrying into Judge Shaw's family, was probably no greater than one might expect to find in one surrounded his whole life by lawyers and businessmen daily concerned with the laws pertaining to commerce. In the early works he reconstructed his adventures as a sailor with legalistic overlays. These appear to have been added after his return, perhaps with the help of lay manuals of the law. Charles R. Anderson's review of Melville's activities in the Pacific⁷ was a detailed study which turned up no record that Melville brought a specialized knowledge of the law to these experiences while they were in fact occurring. In fact, the evidence points the other way. Melville recounted his South Sea adventures with a good deal of hindsight and with a view to exonerate himself in the eyes of his immediate friends and relatives, many, if not most of whom, were lawyers. A

⁷Charles R. Anderson, Melville in the South Seas, 2nd ed., rev. (New York: Dover Publications, Inc., 1966).

few points will suffice to map out his career as a "sea-lawyer".

Anderson verifies the encounter with the Acting British Consul Wilson in Tahiti as Melville described it in Omoo. However, he points out that the incident had greater significance for Melville, quite naturally, than it did for Wilson. Reviewing surviving correspondence from the Acting Consul during the exact period of the Lucy Ann mutiny, Anderson found no mention of the affair in Wilson's personal account of his activities (Anderson, p. 214). Although Anderson failed to turn up the affidavits and depositions which Melville said were taken and enacted in the course of a "kangaroo court" proceeding, these papers were unearthed by Ida Leeson, a later researcher, who published the material in the Philological Quarterly (October, 1940).⁸ One interesting feature about this official account of events is that it makes no mention of the "Round Robin". Melville reported that the mutineers had supposedly gotten up this curious document, in which all the signatures were arranged in a circle, in order to share the responsibility of presenting their grievances to the consul, a "legal" maneuver if ever there was one, and possibly one which never existed except in Melville's fertile imagination. In all other respects the records are filled with the minutest detail of the story essentially as he retold it,

⁸Ida Leeson, "Mutiny on Board the Lucy Ann," Philological Quarterly, 19, No. 4 (1940), 370-79.

with the exception that the grievances as recorded by Wilson and his court do not include the abominable condition of the ship. Melville represents this outrageous dilapidation as the chief cause of unrest among the crew, but the fact is that the Lucy Ann saw a full ten years more of service before it was finally scrapped (Anderson, p. 202).

One possible source for Melville's innovation in the story, if such it was, is lawyer-sailor Richard Henry Dana, Jr.'s Seaman's Friend, which contains a section on the authority of consuls in foreign ports.⁹ In that handbook, Dana explains that the unseaworthy condition of the vessel is a just cause for permitting the mates and the crew to force the captain to take the ship into port for inspection and repairs (Dana, Seaman's Friend, pp. 204-205). If Melville wished to retell his story and at the same time whitewash his actions in the eyes of his parlor audiences, the condition of the ship would have provided a plausible argument.

All of these circumstances suggest that Melville's reconstruction of the mutiny was colored and organized, perhaps with the help of Dana's law manual for sailors, to foster the idea that the crew was not acting illegally or unjustifiably in rebelling. The case he constructs for himself and his fellow crew members is not unworthy a "sea-brother" (as he called Dana) turned lawyer for the occasion.

⁹Richard Henry Dana, Jr., The Seaman's Friend (Boston: Charles C. Little, James Brown and Benjamin Loring & Co., 1841), pp. 205 and 209.

In like fashion, Melville dressed up the motives of his romantic young heroes in Typee and Mardi to conform to a legal excuse for quitting the vessel. Ordinarily, in order to maintain discipline at sea, and particularly in foreign ports, the ship's articles were considered binding upon sailors (Dana, Seaman's Friend, pp. 201-203). In the case of a whaling voyage legal technicalities regarding specified destinations were admittedly qualified by the exigencies of the whale fishery's notoriously lengthy, roving cruise. Melville's glib justifications of his sailor heroes' actions might have done very well for a parlor audience of Wall Street lawyers, but they must have seemed rather specious and artificial to anyone familiar with the usages of the sea.

Again, Dana's Seaman's Friend, written and published after Melville had shipped on his whaling voyage, contained specific advice for the sailor concerning his legal status under the ship's articles. It must be remembered that Dana wrote the book having in mind the need to educate sailors to their rights and responsibilities, many of which had been established by that time in court but not in custom.¹⁰

¹⁰Dana knew that men before the mast needed information about their rights. The existing popular work, Joseph Blunt's Merchant's and Ship-master's Assistant, was exactly what its title suggested, a handbook for the owner's and officers, not for the forecandle hands. Its language was dry and technical, and any common sailor would have had a hard time deciphering it. Dana's book was written in simple language. It became popular in both America and in England. It went through more than ten printings in several editions. Following the success of this handbook, Blunt's manual appeared with whole sections lifted from Dana's work, even to exact citations of legal precedents listed at the bottom of the pages.

There is no reason to assume that Melville knew much more than his shipmates about the laws covering their condition. Such legal expertise as had been available to him through his uncle or his education was relevant to commercial pursuits on dry land, an entirely different body of law. The legal excuses offered in Melville's first three books bear the stamp of the layman conjecturing unknowledgeably and wishfully on the basis of manual or handbook instructions. Since other evidence in Melville's work indicates a reliance upon Dana's work,¹¹ it is probable that his legal reconstructions of his actions in the South Seas were shaped by the advice in the Seaman's Friend at a period after his return and during the hindsight of composition.

As Anderson has noted, Melville's analysis of Polynesian life concentrated upon its state of semi-civilization (Anderson, p. 238). He presented many ludicrous anecdotes of hypocrisy and sham that went on as a result of the missionary blue laws imposed upon the islanders without reference to native custom. Some of these observations have been traced to his sources, especially the accounts of one Quaker Wheeler (Anderson, p. 268-69). Nevertheless, it is significant that Melville's overall indictment of the situation was directed against the peculiarly Christian aspect of western civilization (Anderson, pp. 237-283 and p. 309) and against the authoritarian

¹¹Robert F. Lucid, "The Influence of Two Years Before the Mast on Herman Melville," American Literature, 31 (1959), 243-56; see also William H. Gilman, Melville's Early Life and Redburn (New York: New York University Press, Washington Square, 1951), pp. 132-33.

abuses of theocracy, rather than against any specific failure of adequate jurisprudence in the islands.

On the other hand, Melville's thinking appears fully developed concerning the error of imposing laws externally or from above without reference to custom and mores. Proponents of the English Common Law in America, a system of jurisprudence which was under severe attack during the composition of Typee, Omoo, and Mardi, were fond of pointing out that the English law drew its strength from its historical growth out of custom and familiar usage. Such talk formed much lively debate in New York in 1846-47 because David Dudley Field was busy pushing his codification reform proposals through a newly elected, liberal state legislature. The idea that artificial codes of rules would replace their great historical body of precedents caused frantic dismay among members of the established legal profession. It is possible that the fomentation over this issue in New York State may have flavored the peculiar cast of Melville's South Pacific chronicles (see Chapter V).

With respect to legal technicalities, Melville's accuracy is erratic. In Redburn, for example, another work bearing signs of Dana's influence, there are several errors in point of law which argue carelessness or ignorance on Melville's part. It is true that runaway sailors forfeited their pay for the voyage, but not if they returned to duty voluntarily within a specified time limit. The captain, moreover, had no choice but to take them back if they

presented themselves in fit condition. Thus the captain's actions at the end of Redburn only half conform to the law of the matter.

White-Jacket provides another notable instance of Melville's suffusing his narrative of "true" experiences with legalistic re-interpretations. A major influence upon this novel was again Richard Henry Dana, Jr., by that time a prominent attorney in Boston. Melville had been in that city for nearly three months immediately before his hurried composition of Redburn and White-Jacket. During that time he is known to have met Dana on at least two specific occasions and no telling how many more besides (Leyda, I, 293). Both novels display a kind of legal humanitarianism for which Dana had already become famous. White-Jacket, as we now know, drew most of its legal information and its material against flogging from two articles in Blackwood's, a British review, and from one article published in the Democratic Review. Although Melville is known to have borrowed the volumes of Blackwood's from Duyckinck's library, the writer for the Democratic Review criticized him shortly after White-Jacket's publication for using so many references to British law. Thus it is somewhat unlikely that any of the nationalist lawyers of the "Young America" group, which means most of Melville's New York acquaintance, were responsible for the encouraging him to use that material. The implication is, of course, that at least on this occasion Dana helped Melville do his homework in preparing the case against flogging.

In conclusion, it is safe to say that Melville brought less of a legal eye to bear upon his experiences at the time of their happening than he did later in recalling them for his public. While he was writing his first book he faced an intelligent audience in an immediate circle of friends which was made up, as we shall see, of a good number of lawyers and of litterateurs who had a legal education, many of whom were contributing their literary talents to the cause for legal reform. All of these men were involved in the bustling commercialism of New York City, some in politics and some in creating a "Knickerbocker" center for the arts in opposition to New England's transcendentalist hegemony. Their healthy respect for legal philosophy, despite a penchant for satirizing the foibles of the profession, most certainly encouraged Melville's manner of retelling his adventures, what Anderson has called his "brief against civilization".

Although Melville had little or no specialized training in the law, he dwelt close among people who were merchants and lawyers. For these men the law held a consuming interest. It was part of the spirit of their times and for them a medium for interpreting the world. Unsystematic as well as systematic knowledge of the law and of legal terminology was shared among them. They used it casually in conversation, correspondence, and all forms of social intercourse; and one may assume that Melville too shared in such a cultural commonplace.

If this casual acquaintance with the law were the extent of his

involvement, there would be little left to do but review a catalog of curious and unrelated examples of legal jargon or metaphors in his work. But Melville was a man of great intellectual curiosity. His education, especially in his mature years, though undeniably of the haphazard variety that his father-in-law Judge Shaw was known to have deplored (Metcalf, p. 32), was nevertheless apt to be profoundly investigative of whatever subject seemed important to him. His introduction to intellectual life was through men conversant with the law and with legal philosophy. Their political interests, their habits of mind, their approaches to solving the riddles of life, of conceiving problems and producing a workable methodology for analyzing them, these all became part of Melville's intellectual equipment. For this reason it is difficult to understand the terms of some of the problems dramatized in Melville's work unless one is acquainted with the outlines of contemporary legal issues and with the legal philosophy which formed an entire matrix for thought in America during the pre-Civil War decades.

Melville's re-entry into the big city and to the cultural life available there was through young lawyers. Though evading law as a career, Melville found it difficult to escape the company of the legal fraternity. His brothers lodged him and introduced him to their friends. He renewed an acquaintance with Alexander W. Bradford, who had gained enough social and professional prominence to help

organize the "Boz Ball" in 1842 when Dickens came to town.¹² he became familiar with the Duyckinck brothers and in due time knew the young William Allen Butler, later famed as an expert in admiralty law,¹³ David Dudley Field, then engaged in the opening stages of his effort to codify the laws of the state, and political journalists Cornelius Mathews and William Cullen Bryant, both of whom were originally lawyers. The Duyckinck brothers themselves had studied law and passed bar examinations, although they declined to practice. Most of the Duyckinck coterie, dubbed "Young America" because of its nationalist politics, operated as the literary arm of the radical Democratic party. It was not out of place, in what Van Wyck Brooks has called "Gulian C. Verplanck's New York", for the men of letters to concern themselves with such mundane affairs as politics and law reform.

Melville's literary and intellectual companionship during his most productive years was dominated by the "legal mind," as Perry Miller has dubbed it. If we were to search, however, for the presence of legal philosophy in his works entirely in the form of subjects specifically identifiable as problems of law or under the

¹²New York Evening Post, 11 (February 2, 1842), 2 and New York Evening Post, 11 (February 3, 1842).

¹³William Allen Butler, A Retrospect of Forty Years (New York: Charles Scribner's Sons, 1911), pp. 215-16.

trappings of legal procedure, we would miss a great part of its significance as a prevailing authorial attitude or point of view.

An important influence of the law upon Melville was the shape which the characteristics of the legal mind gave to his thought and literary style. The influence was general and pronounced in New York City and particularly prevalent among Melville's connections. The men identified as his social and literary mentors, with the exceptions of Hawthorne and Dr. Augustus Kinsley Gardner, were either lawyers or men who had a law education. Their influence upon Melville was threefold. First, they insisted upon a certain amount of realism of a particular kind in the writings they respected, and they appreciated a brand of humor characterized by the pun and by satire. Second, they rejected transcendentalism primarily because it conflicted with their notions of common sense and with their training as lawyers to stick to the facts and nothing but the facts. Third, they provided Melville with the methodology of equivocation and the open-ended dialectic so characteristic of his work. Melville's decision to become a "philosophical novelist" was a reasonable reaction to the tastes of the successful men around him. It is appropriate, therefore, to pause here to give some background information about Melville's social and intellectual milieu. The growth of New York City during the twenty year period from 1830 to 1850 can only be described as a physical and financial explosion.

Population grew from 202,589 in 1830 to 515,547 in 1850.¹⁴ Volume of business in trade, real estate, and financing as measured by capital gain for those years increased in equally dramatic fashion.¹⁵ Despite several severe panics and depressions, the biggest of which was the crash of 1837, New York City had enjoyed an unrivaled growth and prosperity in which one man's loss was a necessary sacrifice to a mushrooming financial power.

Under these conditions, New York offered ample opportunity for young lawyers, especially those interested in real estate and corporation law. The rate of increase in the membership of the New York bar outdid the phenomenal growth of the city as a whole. The New York Annual Register for 1835 shows that the 1,248 attorneys and counsellors in New York State in 1820 had nearly doubled to 2,052 over the fifteen year period. In 1835 New York City alone could claim 303 of these. In 1843, only eight years later, the number of attorneys and counsellors in New York City had increased to 1106, or approximately one-third of the 3041 for the state. By 1858 the

¹⁴United States, House of Representatives, Abstract of the Returns of the Fifth Census 1830, Doc. No. 263 (Washington, D. C.: Duff Green, 1832), p. 9; and United States, Census Office, 7th Census of the United States: 1850 (Washington, D. C.: Robert Armstrong Public Printer, 1853), p. 210.

¹⁵Jean Gottmann, Megalopolis: The Urbanized Northeastern Seaboard of the United States (New York: The Twentieth Century Fund, 1961), pp. 136-46; and Jane Jacobs, The Economy of Cities (New York: Random House, 1969), pp. 142-79.

the total for New York City was 2,052, for the state, 4607.¹⁶ The size of the New York City bar in 1858 equalled that of the entire state only two decades previous, and it included some of the most distinguished members of the profession then alive, among them Benjamin F. Butler, Daniel DeForest Lord, the Kents, the Hoffmans, the Sedgwicks and others too numerous to list.

The New York lawyer was basically a businessman. He took care of the paperwork involved in making leases, contracts, and otherwise manipulating capital. He also performed the more important task of expanding the legal framework in which business could operate. A New York lawyer would have viewed criminal prosecution as the least important part of his caseload. Unlike the Boston bar, which could boast a galaxy of stars like Webster and Choate, master rhetoricians, the New York bar was made up of lawyers devoted to the dry and arcane intricacies of insurance, real estate, and banking.

One observer among Melville's acquaintance, William Allen Butler who started his law practice in New York City in 1848, memorialized the New York bar fifty years later in the following terms:

When I commenced practice the chief business of the profession in the City of New York was collecting debts for dry goods merchants and other commercial houses. We had our share of this business, which was largely carried on in the local Court of Common

¹⁶Edwin Williams, The New York Annual Register for the Year of Our Lord, 1835 (New York: Edwin Williams, 1835); and Disturnell's New York State Register for 1858 (New York: John Disturnell, 1858).

Pleas and in the New York City Superior Court. . . .
 As business increased we found new connections in banking, insurance and other corporations formed by our clients and opening large fields for professional activity, while the enlarged foreign commerce of the country greatly multiplied the cases coming within the Federal jurisdiction.

(Butler, Retrospect, p.215)

An anonymous article, titled simply "The New York Bar," appeared in the Literary World for July 27, 1850.¹⁷ The author complains that "the intellectual characteristics of the Bar of New York are, . . . good sense, business talent, considerable tact, but no genius, no wit (or little), some humor and drollery, fluency, but not often eloquence, very little or no imagination. Power over the feelings---pathos---is exceedingly rare." Such was virtue among men whose main business was to protect their clients from the embarrassment and expense of an open court scrutiny into their affairs, or whose major contribution was to introduce new practical operations and oil the machinery of big business.

There is another aspect of the lawyer, however, which their critic in the Literary World neglected to mention. As de Tocqueville pointed out and Perry Miller reaffirmed,¹⁸ the lawyer was America's

¹⁷"H.," "The Bar of New York," The Literary World, 7, No. 4 (1850), 65; see also an anonymous article in the New York Review, 8 (1841), 375-83.

¹⁸Alexis de Tocqueville, Democracy in America, ed. Phillips Bradley (New York: Vintage Books, 1945), I, 282-90; and Perry Miller, The Life of the Mind in America from the Revolution to the Civil War (New York: Harcourt, Brace & World, Inc., 1965), p. 121 and passim.

self-proclaimed intellectual. Nowhere was this phenomenon than in the par venu society of New York City, comprised chiefly of the "merchant princes and their chancellors"; i.e., the attorneys they engaged. The presence of the businessman-lawyer in New York's cultural establishment contributed an important element to the "Knickerbocker" flavor of New York's literary products.

First, these lawyers were above all paragons of the practical bourgeoisie. Their interests were primarily in the secular world of everyday reality. They tolerated fancy, absurdity, even the grotesque, so long as it remained relevant to the passing scene with its problems of controlling the commercial-political empire. In his essay "Melville the New Yorker" Alfred Kazin brought to our attention a remark by diarist George Templeton Strong which reveals the literary spirit of New York. Strong wrote, "Literature pursued as an end, for its own sake, not for the truths of which it may be made the vehicle, is a worthless affair."¹⁹ Strong was a lawyer as well as a patron of the arts. To what then are we to attribute Strong's utilitarian opinions? It would seem likely that his attitude was more a product of the law office than the library.

The profession and its conservative clientele generally disapproved of the lawyer who openly dallied with the Muse. In his

¹⁹ Alfred Kazin, "Melville the New Yorker," New York Review of Books, 20, No. 5 (1973), 4.

memoirs, A Retrospect of Forty Years, 1825-1865, Butler mentions the need for lawyers who would be poets or novelists to conceal their avocation from the public:

Nothing to Wear appeared anonymously, as was very generally the custom at that time in respect to articles in magazines and periodicals, except in cases of writers whose names were exceptionally well-known. I feared that if I were known to be a writer of verses, it might injure my standing as a lawyer. Members of my profession were permitted to make politics an adjunct of their practice at the bar, but dalliance with the Muse and dabbling in verses were apt to come under the ban of a commercial clientage. . . . A case closely resembling mine was that of Henry MacKenzie, author of 'The Man of Feeling,' a popular English novel published in 1771. He was a barrister devoted to his profession; and, activated by the same dread of injuring his prospects as a lawyer that prevailed with me, he gave his book to the world anonymously.
(Butler, Retrospect, p. 279)

Professionally, at least, the lawyer was expected to keep his mind on business, and avoiding even the appearance of evil, to display only his best prose. Under these conditions and in the pinched times of a young Industrial Revolution, young men often found themselves forced to make a choice. Many turned irrevocably to a legal career; still others quit law practice to become some of America's best writers in the first half of the 19th century.

Within the new business ethic, however, which was nowhere more potent than in New York City, virtue coincided with acquisitive materialism. The merchant-lawyer class was close to popular sentiment and popular literature in a way that religious, transcendentalist

New England could not be. The prosaic, business-minded character of the New York lawyers did not prevent them from appreciating modern popular literature and in some cases helping to produce it. They censured, on the other hand, literature which was escapist or purely fantastic. They did not well tolerate any of their number writing literature which had no utilitarian purpose. They deplored the novel in its sentimental character; they rejected poetry of an inspired kind. Those members of their own class who were inclined to write that way were often ushered by the kindly patronage of their fellow bar members into pursuits for which they were deemed more fitted; i.e., journalism and editorial work. Charles Fenno Hoffman had been among those who practiced law intermittently but had been deemed by his distinguished relatives to be more suited for a life of literary endeavor. Cornelius Mathews and William Cullen Bryant suffered the same fate. The Sedgwicks, prominent New York lawyers, were responsible for Bryant's editorial position on the Evening Post.²⁰

Those who did retain the respect and favor of the New York intelligentsia wrote works which had relevance to the visible world of business and society. William Allen Butler's "society verse," such as "The General Average" and "Nothing to Wear" or

²⁰ Henry M. Field, The Life of David Dudley Field (New York: Charles Scribner's Sons, 1898), p. 37.

even his novel satirizing the illegality of the common church raffle were acceptable because they combined common sense and real issues with entertainment and humor. Other lawyers wrote biography, history, law treatises and political pamphlets. Alexander Bradford was among several who wrote on scientific subjects, including a work on American Indian archaeology, a popular topic in the 1840's and 1850's which inspired among other things, Cornelius Mathews' grotesque novel, Behemoth: A Legend of the Mound-Builders.

Local history and politics were approved topics for New York writers. These provided the material for much of Irving's "Knickerbocker" histories, a tradition of writing followed by his nephew, John Treat Irving, Jr., and by Hoffman and Mathews. Even Washington Irving's romances, "The Legend of Sleepy Hollow" and "Rip Van Winkle," gained some of their contemporary popularity because they contained satires on current politics. The former dramatized the conflict between the established Dutch patroons and the influx of restless, hungry Yankees from the north. The latter alluded to the political reforms which had rocked the foundations of power in New York State. Irving's lesser known works were history, biography, and travel sketches. Responding to the same audience, Cooper exploited the "ways of the hour," volume after volume of his novels yielding up pithy discussions of America's political destiny and containing much explicit discussion

of law as well---the scrape that first sends Natty Bumpo into the wilderness, for example, or the essays and discussions contained in A Letter to His Countrymen (1834), The Monikins (1835), The American Democrat (1838) and The Ways of the Hour: A Tale (1850).

Some lawyers who had stood at a crossroad of a law career versus a literary life made the law their final choice. Among those who had had to make such a decision was Melville's own father-in-law, Lemuel Shaw. After Shaw completed his education at Harvard, he taught school in Boston. He became assistant editor on the Boston Gazette, a newspaper newly founded at the turn of the century with commercial, political, and literary contents. The paper was staunchly Federalist. Shaw continued to waver in his choice of professions between law and literature. A letter written to the young man by his mother in February, 1801, advises Shaw to follow his conscience, but also to consult with his uncle, the distinguished Dr. Hayward of Harvard. He was eventually convinced by Hayward that his writing was too ponderous and lacking in brilliance of wit for real success in a literary career, and he was persuaded to be a lawyer.²¹

Nevertheless Shaw persisted in his literary projects over the next few years with a translation in 1802 of A Political and

²¹ Frederic Hathaway Chase, Lemuel Shaw: Chief Justice of the Supreme Judicial Court of Massachusetts, 1830-1860 (Boston and New York: Houghton Mifflin Company, The Riverside Press, Cambridge, 1918), pp. 31-35.

Historical view of the Civil and Military Transactions of Bonaparte, First Consul of France by J. Charles (Shaw's translation was never published) and with occasional poems contributed to The Farmer's Cabinet, another short-lived periodical. In November, 1803, the poem "Dancing" appeared in this paper, for which Shaw was admired by a host of excited young ladies at a ball the following evening (Chase, p. 43). Shaw's early desire to be a writer no doubt accounts for the substantial help he was willing to extend Melville over two decades of financial difficulty.

Shaw was not the only member of Melville's Boston acquaintance who was a lawyer with a demonstrated interest in literature. Richard Henry Dana, Jr. professed a wish to be known primarily as a lawyer, and, like Butler, often expressed annoyance that his fame as the author of Two Years Before the Mast seemed to outrun his legal reputation. Melville knew socially other lawyers in New York who were interested in literature. Theodore Sedgwick, Jr., brother of the fairly well-known writer Catherine Sedgwick, was a practicing lawyer, but he also wrote histories and legal treatises. David Dudley Field patronized literature, especially if it could be pressed into service for his great cause, the procedural reform of the law.

Melville's free and casual social intercourse with many of these figures is a matter of undoubted record. He knew Charles Fenno Hoffman at Evert Duyckinck's on Saturday nights. Hoffman has been

described as Melville's personal friend.²² Through association in the Duyckinck circle Melville also knew Field, Sedgwick, Butler, Mathews, George Duyckinck, Richard Henry Dana, Sr., and Parke Godwin. Field, Sedgwick, and Mathews lived close by to his home in Pittsfield. All had at least a law education and in some cases as practice as well. He also could have met Evert Duyckinck's old tutor, John Anthon, and the illustrious James Kent. He met Washington Irving and William Cullen Bryant, and he was acquainted with Pierre M. Irving. Of all these men, Duyckinck and Mathews appear to have been Melville's most intimate acquaintances and most frequent companions from 1847 to his removal to the Berkshires in 1850. These men formed an immediate audience for Melville's early work. Their interests, their sense of humor, their politics and their ways of thinking created the intellectual atmosphere which surrounded him when he began his career in the 1840's; and it is significant that every one of them had been trained in the law.

In the first place, the "no-nonsense" attitude of the lawyer set seems to have worn off on Melville. Certainly he was pressured by their literary taste. Critics have complained that Melville lacked inventive ability where the story line was concerned. Yet if one were to measure his efforts against the demands of his

²² Luther Stearns Mansfield, "Herman Melville: Author and New Yorker: 1844-1851," Diss. University of Chicago 1936, p. 79.

intellectual environment, one would perceive that he was encouraged at the beginning of his career to play up fact and truthfulness of event and to play down fantasy and fiction. It was under Dana's influence that Melville returned to realistic descriptions in Redburn and White-Jacket after his brief excursion into the fantasia of Mardi. Melville's writing ability was developed along the lines of a utilitarian ethic and taste that preferred the wonders of the visible world to those of the invisible. Reacting to his reviewers' skepticism about the veracity of Typee, Melville prepared an anonymous article in its defense which he sent to Alexander Bradford for publication in the Morning Courier and New York Enquirer. Although the Duyckinck brothers puffed Mardi in the Literary World, their private correspondence shows they had many misgivings about the fantastic sections of the book. One might also recall that Richard Henry Dana, Jr., was particularly concerned that writers of sea literature who came to him for advice should realize that it was important for them to give accurate, responsible descriptions of the life they sought to portray.

Melville also responded to the interest in politics and current events. We have already noted the possibility that controversy over the English Common Law in America might have flavored his emphasis in the South Sea stories. Court procedure reforms being pushed by Field, Mathews, and Bryant during 1846-47 may have prompted a satire in Omoo in which Melville included a hilarious description

of a native court with almost no procedure at all.²³ Although his report and commentary upon the state of affairs in the islands were limited by his knowledge of international politics, still he responded to the notion that the enthusiasm for such material existed in his audience. His perceptions were no doubt strengthened by his critic-friend, Evert Duyckinck, who was well aware of what the taste, in New York at least, demanded. If Melville's associates shared in common the "legal mind," as Perry Miller has dubbed it, they would have found their intellectual meat and drink in Melville's display of the political conditions in the islands as they could not have done with any purely romantic gilding of the scene.

It is significant too that during his New York years Melville developed his penchant for satire and allegory, which eventually became a basis for his skill with symbolism. This brand of humor refers constantly to the events and the characteristics of the real, ongoing world. Anyone who pages through a number of legal periodicals current in Melville's day will find that humorous anecdotes of actual occurrences and satire are most prevalent. Cornelius Mathews was noted for his satiric sallies in behalf of legal reform. A writer signing himself simply "H." published articles of the same

²³Herman Melville, *Omoo*, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston and Chicago: Northwestern University Press and the Newberry Library, 1968), pp. 299-300.

nature in the Literary World.²⁴

Although the inclination to enjoy the vignettes of concrete, mundane reality was general among those with the "legal mind," there was a special motivation within the "Young America" group to encourage the American writer to draw his materials from the world around him. The rationale was developed in a review of Theodore Sedgwick's collection of the Political Writings of William Leggett which David Dudley Field published in the New York Review for April, 1841.²⁵ In this article Field asserted, "We are a new nation with old opinions; our facts have outrun our ideas" (Field, review of Leggett, p. 389). This is the observation upon which he built his nationalism. It is also the principle underlying "Young America's" doctrine that the American must reject the prejudices of European opinion and mere theorizing in favor of a fresh observation of the current scene. Although Melville had been caught up for a short time in the activities of this group, he quickly lost his enthusiasm, and the movement itself subsided. One suspects after close scrutiny of the way he presented the operation of a "code" in

²⁴H., "The Ghost of Nisi Prius," The Literary World, 6, No. 14 (1850), 341-42 and "The Young Attorney Who Could Have Saved Webster," The Literary World, 6, No. 16 (1850), 389-90.

²⁵David Dudley Field, review of A Collection of the Political Writings of William Leggett, in The New York Review, 8 (1841); Perry Miller identifies Field as the author of this unsigned review.

the South Sea islands and his satire on a court with too little procedure (see above) that he was never really in agreement with their views anyway. Eventually in Mardi he inserted a denunciation of these disestablishmentarian notions, chiding the radicals for wanting to discard the past altogether.

Nevertheless, his friends hoped that the American writer would draw his material from the scenes around him did visibly influence Melville's work. Besides the political comment in Mardi, he "covered," as one says in journalism, the New York to Liverpool traffic (Redburn), the U. S. Navy (White-Jacket), the American whaling industry (Moby-Dick), the rent wars of upstate New York (Pierre), life in an American metropolis (Pierre), the law offices of Wall Street (Pierre, Bartleby), the Bunker Hill Memorial celebration (Israel Potter), a Mississippi river-boat (Confidence-Man), and scenes from the Civil War (Battle-Pieces). After his experience with Mardi, he also followed for the most part the advice of his friends to abjure the training of books, which had to be foreign because no American literature as yet existed, for the training available "from the life which he sees around him" (Field, review of Leggett, pp. 393-94).

There is more, however, to the influence of the "legal mind" than its impact upon aesthetics. A most essential characteristic of the legal process was its forensic requirement, the rigorous dialectic of the trial. Whether a case was to be argued by way

of writs and replies or whether evidence was to be presented to a jury with argumentation pro and con, a court of law arrived at the truth by means of a debate between at least two points of view, neither necessarily correct in itself, or both possibly true at one time.

In Silas Jones' Introduction to Legal Science (New York, 1842), this explanation of the dialectic is offered to the layman:

After all it is but truth to say, that different individuals will come to different results, as to the relations of the terms of a proposition to each other, and yet there shall be no actual fallacy in the statements or reasonings of either. . . . When this is the case, one asks how shall we establish the truth? To this I only reply that, those who have what we term the best balanced minds, and are most free from the influences which tend to warp opinions, are, other things being equal, most likely to be right.²⁶

Although Jones hedges the problem considerably, he illustrates the lawyer's preoccupation with establishing the "truth" in a conflict of opposing views. Further, he proposes the "balanced mind" as a solution to the poser, a concept somewhat suggestive of the "equal eye" which a critic has told us is Ishmael's narrative position and the source of balance in Moby-Dick.²⁷

²⁶Silas Jones, An Introduction to Legal Science (New York: J. S. Voorhies, 1842), pp. 54-55.

²⁷Beoncheong Yu, "Ishmael's Equal Eye: The Source of Balance in Moby-Dick," Journal of English Literary History, 32 (1965), 110-25.

In the review of Leggett's Writings cited above, Field also makes an apologia for dialectic. In his analysis of the American party system one can see the "legal mind" at work:

Parties are, nevertheless, inseparable attendants upon free governments. It is vain to expect uniformity of opinion. Human minds are too various, and subject to too many different influences. Scarcely any two minds will come to the same conclusions upon the same facts---some are not ascertained, or are imperfectly understood. So that what with honest mistakes, as to facts, and honest mistakes of reasoning, and the perverse influences, more powerful still, of interest and passion, it is not strange that the world presents an infinite diversity of opinion and is split into parties, sects, and factions. (Field, review of Leggett, pp. 396-409)

Field saw the salvation of this situation in the dialectic which is created whenever two or more parties enter into the struggle of debate. In the conflict of opposing views, unexpected truths will emerge, wrote Field. Further, upon the field of political activity ideas may be tested in actual contest. If they remain only refined abstractions of the armchair philosopher, it may never be known what relationship they actually bear to reality.

In his faith in the dialectical process, Field displays an essential characteristic of the "legal mind". Even those lawyers who opposed Field in his codification efforts nevertheless invoked the dialectics of the common law procedure as its most valuable contribution in the search for truth and justice. In The Law Student, a work published primarily, one suspects, as anti-reform propaganda,

John Anthon, Duyckinck's old tutor, extols the science of special pleading as "the most refined species of logic applied to the ordinary transactions of life," which was, moreover, "reducible to the strictest rules of pure dialectic."²⁸ In that same work Anthon also pointed out that it was deemed indispensable to the process of justice in England that the lawyer be able to advocate indiscriminately the defense of the right and the wrong side of a case, for it is in the debate between the two that the truth may emerge (Anthon, p. 208). Thus by surrounding the problem with multiple perspectives, the lawyer can make identifications in an elusive and often inscrutable reality. The whole truth was often to be found by the court somewhere between the opposite poles of argumentation.

Such reasoning presupposes that facts of themselves do not cohere into simple, convenient meanings. Before they may serve as usable information, they may require the shaping of human construction. Those who most distrusted "law logic" were men who wished the world to be a place of simple, unequivocal truth. The study of Allan Melvill in the preceding chapter showed him to be a man of this sort; and, as we have seen, Allan did complain to Peter Gansevoort about his law logic. Men who felt as Allan did wanted their facts to fit the definitions. They wished to act as though the name of

²⁸John Anthon, The Law Student, Or Guides to the Study of Law in Its Principles (New York: D. Appleton & Co.; Philadelphia: G. S. Appleton, 1850), pp. 85 and 95-96.

a thing were the thing itself. The youthful debater who complained of Melville's character in the "Philologos" quarrel disparaged him precisely because "like a wary pettifogger, he never considers 'this side' right, and that stark naught," or in other words, has no fixed principles, but can hear as the wind blows without gripings of conscience" (Leyda, I, 79).

Years later Melville was to assert the methodology of equivocation in writing Moby-Dick, Pierre, and the Confidence-Man as an essential part of the "great Art of telling the Truth". In doing so, he merely demonstrated the fruits of his schooling among the intellectuals of the legal fraternity.

For this reason, however, point of view in Melville's work has always been something of a problem. From the time of his first publication to the present Melville has been provoking his readers by his inclination to indulge in exploratory, speculative thinking. Mardi, the first of his works to raise literary censure on this score, upset readers by its voyage into the obscurities of inconclusive debate among five wandering philosophers. The sailor-hero who begins the journey evolves into a demigod. This transformation was in itself a way of gaining detached observation for the voice of the story teller. The narrative point of view then disintegrates as the narrator multiplies into five different characters, increased now and again, by various philosophers encountered along the way. Melville splits the narrative point of view in this fashion in

order to debate metaphysical and political questions. Without an authoritative narrator, however, the issues remain in dialectical exposition and the reader must provide the answers for himself.

Unlike Moby-Dick, not even the action in Mardi provides the reader with a conclusion. Although the others put their doubts to rest, if not to resolution, by choosing to become members of a religious community, Taji refuses to abandon his quest. As the book closes he repudiates all solutions, and plunging across the reef, exits into the open seas---"Mardi behind, an ocean before."

Fragmented point of view in Moby-Dick is commonly complained about. Again, the first person narration breaks down, and the authority which belongs to a participating main character is replaced by an equivocating voice which seems determined to present all possible sides of any question that arises. After the transformation of the narrative voice the reader must assume a role not unlike that of a juror in the case. Ishmael then parades before the public his "separate citation of items" and leaves judgment to his empaneled readers.

At least one reviewer of Mardi criticized that work for its over-abundance of "anti-thesis," a Carlylean manner which he found wearing (Leyda, I, 299). In Mardi, however, Melville not only placed his philosophers into situations of lively debate, but had them take up the value of the dialectic itself. After a spirited argument between Mohi and Yoomy over the importance of their re-

spective callings, Babbalanja interferes with the advice, "Peace, rivals. As Bardianna has it, like all who dispute upon pretensions of their own, you are each nearest the right, when you speak of the other; and furthestest therefrom, when you speak of yourselves."²⁹ In the chapter "Faith and Knowledge" Melville counsels us "Let us not turn round upon friends, confounding them with foes. For dissenters only assent to more than we" (*Mardi*, p. 296). More than once the philosophers point out that we will sooner know the secrets of another than those of our own, that it is because we cannot be detached (i.e., leave *Mardi*, or the world) that we do not have the perspective for the whole truth.

Chapter V of this study elaborates more fully upon the value of the dialectic in Melville's work and the influence that legalism may have had upon his metaphysics and ethics. It may not be out of place here, however, to say a word or two about the impact of the lawyer's attitude toward transcendentalism may have had upon Melville's thinking.

Lawyers as a class were opposed to transcendentalism. They were accustomed to dealing with reality on the basis of evidence and pragmatic result. The lawyer could not bring phenomena or suppositions into the courtroom which could not be demonstrated

²⁹Herman Melville, *Mardi and a Voyage Thither*, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston and Chicago: The Northwestern University Press and the Newberry Library, 1970), p. 281.

a posteriori from the facts to the rational satisfaction of judge and jury. The transcendentalist was concerned, first of all, with that which goes on beyond the natural, or visible world. The lawyer had to deal with the natural order as sufficient. He was always ready to admit that there are some things we can never know; yet because society must be able to deal with every phenomenon, the law had evolved a procedure for dealing with these unknowables in a practical, if not a rational manner. The law of cause and effect was accepted as being true; evidence was presented only according to time-tested rules of empiricism; witnesses were corroborated, etc.; and where all else failed, the law had evolved certain presumptions, which were said to derive from "common sense" experience, about the way in which facts were to be regarded by the court. Truth, for the "legal mind," was not a private chimera spun out of the self, for the self, but a public agreement as to the meaning of facts which could be established in the courtroom in the manner described.

Developing this last point further, one might say that the "self-reliance" advocated by the transcendentalist thinker was inimical to the idea of a community governed by the laws and institutions to which all must give consent. Law was an external standard, bearing a certain relationship to internal standards of morality, but not the same as these at all. Transcendentalism cleared the way, in fact, for placing the will of the individual above his social obligations. While emphasizing the worth of the

individual, not even the radical Democrats of the short-lived "Young America" group endorsed transcendentalist "self-reliance". Their notion of self-reliance was not metaphysical, but nationalist.

Shortly after the publication of Mardi, Duyckinck wrote Melville to ask him whether he was basking in Emerson's rainbow. Melville replied by denying that he had adopted transcendentalism, at least Emerson's brand of it, saying he preferred to "swing in his own halter."³⁰ Duyckinck was right, though, in finding traces of Emerson's mysticism in Mardi, particularly in Babbalanja's declarations that he felt an affinity between his own deepest self and all that is (Mardi, pp. 488-90). Any transcendentalist would have delighted in the pursuit of the ideal personified in Yillah, ending as it does with loss of self in a drowning whirlpool or an infinite ocean. Though the others disapprove of Taji's persistence in this path, their objections are more intellectual than emotional, leaving the reader in the end constrained to admire the young man for his heroic posturing in the hopeless quest.

Melville may have taken the hint from Duyckinck that toying with such ideas was a dubious venture for a promising writer of the "Knickerbocker" set. Works written after Mardi display a marked anti-transcendental attitude. In Moby-Dick, for example, Ahab, a

³⁰Herman Melville, The Letters of Herman Melville, Merrell R. Davis and William H. Gilman (New Haven: Yale University Press, 1960), p. 78.

transcendental hero, is portrayed as a monomaniac who led himself and his crew into senseless destruction. Pierre and Isabel, hopelessly deluded by their willful surmises, rush headlong into a fatal career. Isabel is a transcendentalist heroine whose story, Melville reminds us, would never stand up in the "cold courts of justice".³¹

Melville's position on transcendentalism is not so easily assessed, however, primarily because he did not completely reject all of its doctrines or insights, and because he used transcendental literary techniques. His criticism of that philosophy is significantly qualified by his perception that basic irrationality lay at the root of the doctrines of its "common sense" opponents. In *Pierre*, for example, he openly flays the self-complacency of the "very plain, plodding, humane sort of world" which "scorns all ambiguities, all transcendentials, and all manner of juggling" (*Pierre*, pp. 261-62). He called such men "utilitarian transcendentalists," and in Melville's eyes, they differed from the philosophical transcendentalists only in their version of the nature of reality. They possessed no more grounds for their beliefs about the nature of the world, the data they claimed to receive from their "common sense," than Emerson had for his apprehension of the nature of the

³¹Herman Melville, *Pierre, or the Ambiguities*, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston and Chicago: Northwestern University Press and the Newberry Library, 1971), p. 71.

universe. In Mardi Babbalanja mocked the claims of "common sense" when he explained to the others, tongue in cheek, "Thus. . . does Mardi, blind though it may be in many things, collectively behold the marvels which one pair of eyes sees not" (Mardi, p. 363).

Idealists postulating an essential rationality in the creation probably had less ground for this belief than either the transcendentalists or the utilitarians had for theirs.

to Melville explains the matter in Pierre:

Now some imaginatively heterodoxical men are often surprisingly twitted upon their willful inverting of all common sense notions, their absurd and all displacing transcendentials, which say three is four, and two and two make ten. But if the eminent Jugglarius himself ever advocated in mere words a doctrine one thousandth part so ridiculous and subversive of all practical sense, as that doctrine which the world actually and eternally practices, of giving unto him who already hath more than enough, still more of the superfluous article, and taking away from him who hath nothing at all, even that which he hath,---then is the truest book in the world a lie.

This passage continues:

Wherefore we see that the so-called Transcendentalists are not the only people who deal in Transcendentals. On the contrary, we seem to see that the Utilitarians,---the every-day world's people themselves, far transcend those inferior Transcendentalists by their own incomprehensible worldly maxims. And---what is vastly more---with the one party, their Transcendentals are but theoretic and inactive, and therefore harmless; whereas with the other, they are actually clothed in living deeds. (Pierre, p. 262)

Such, we learn is the "operative opinion of this world" (Pierre, p. 261).

In the Confidence-Man Melville caricatured Emerson in the person of Mark Winsome.³² Winsome begins by warning the cosmopolitan, Frank Goodman, away from Charlie Noble, whom he calls a "Mississippi operator". A discussion ensues, during which the mystic assures Frank Goodman that the former's philosophy tends to the same formation of character with the experiences of the world, adding that "any philosophy that being in operation (italics mine) contradictory to the ways of the world, tends to produce a character at odds with it, such a philosophy must necessarily be but a cheat and a dream."³³ Then the cosmopolitan meets Egbert, Winsome's disciple. By no strange coincidence Egbert is a businessman who has reduced the mystic's philosophy to practical use, put it, in other words, into an "operative system". The comparison of Egbert, a "utilitarian transcendentalist," with the "Mississippi operator" is completed when the cosmopolitan asks him to assume the name "Charlie" for the purposes of their discussion. By now the

³²Egbert S. Oliver, "Melville's Picture of Emerson and Thoreau in The Confidence-Man," College English, 8 (1946), 61-72.

³³Herman Melville, The Confidence-Man: His Masquerade, ed. Hershel Parker (New York: W. W. Norton & Company, Inc., 1971), p. 170.

"boon companions" of the earlier conversation between Frank Goodman and Charles Arnold Noble have become the "hypothetical friends" of the exchange between the cosmopolitan and Winsome's disciple (Confidence-Man, pp. 172-78) Frank the cosmopolitan gets no more boon out of his second companion, however, than he did out of his first.

The cosmopolitan will not allow Egbert to state his first principle in an abstract form; that principle, in fact, is left for the reader to guess. Those who have read the above quoted passage from Pierre will have their hint. The cosmopolitan will only deal with actual test cases to see how Egbert "operates".

The disciple has developed a set of rules which he claims to have deduced from the nature of friendship and loans. His rules anticipate every possible case proposed by the cosmopolitan, each time with an identical result: he can give only to the man who already has, while he can only take away from the man who has nothing. At last the cosmopolitan dismisses him in disgust, exclaiming that what Egbert's illustrious magian has taught him "any poor, old, broken-down, heart-shrunken dandy might have lisped" (Confidence-Man, p. 192). Winsome's philosophy, moonshiny though it may be, had turned out very practical in effect. Melville deliberately placed the conversation with Charlie Noble back-to-back with the exchange with Egbert ("Charlie") in order to show how like were the "Mississippi operator" and the "utilitarian tran-

scendentalist" after all.

A priori principles of any sort, when held rigid without respect to contingency or actual event, make a man a fool or a knave. The story of Charlemont (note again the similarity of names) illustrates the same moral. It is conveniently sandwiched between the Charles Noble and Mark Winsome episodes. Charlemont was a fool for assuming that his friends would cut him when they had found he had lost his fortune (Confidence-Man, pp. 158-60).

Rational abstractions disembodied from the hard core evidence out of which they arose can only produce ambiguity and inconsistency. Of course Winsome, like his original, Emerson, declares he is not afraid of inconsistency. Beyond the inconsistency, however, there is something still more perverting about inflexible idealism. The cosmopolitan and Mark Winsome engaged in the following exchange:

"Who will pity the charmer that is bitten with a serpent?"

"I would pity him," said the cosmopolitan. a little bluntly perhaps.

"But don't you think," rejoined the other, still maintaining his passionless air, "don't you think, that for a man to pity where nature is pitiless, is a little presuming?"

"Let casuists decide casuistry, but the compassion the heart decides for itself." (Confidence-Man, p. 163)

The truth must not be obscured by idealist principles of what it ought to be. The heart and the mind should be left open to the facts of experience, neither should be hedged by rigid, unchanging

ideals and principles. This demand was at the root of Melville's common sensical anti-transcendentalism. It was the same demand that the rules of evidence, as a methodology, were designed to achieve.

The legal mind influenced significantly the way in which Melville approached the intellectual life of his times. What systematic thought was available to him came from lawyers, not from theologians or professors of the liberal arts, as had been the case with many writers. The lawyer, and more so the judge, concerned himself with metaphysics and epistemology for the most practical reasons. In subsequent chapters, therefore, this study will focus upon what use Melville was able to make of the lawyer's "science" of evidence and what influence he received from contemporary quarrels over the need to reform legal procedures for determining "truth". The last chapter summarizes and synthesizes these elements in an exploration of the importance Judge Lemuel Shaw's career may have had in Melville's thought.

Chapter III

Oaths and Holy Writ Proofs

Modern critics have accused Melville of setting up polarities in his works and so carefully tending both extremes, that the reader has little choice but to assume that he meant these opposite aspects to be taken for the equally valid halves of the complete "sphericity of things."¹ Melville discussed the concept of an essential ambiguity in reality in a critical article about Hawthorne written during the summer of 1850. Shortly thereafter he demonstrated his notion by trying to create a real-life white whale in all its positive and negative physical and metaphysical dimensions. Recent studies of the imagery in Moby-Dick show that it is possible, for example, for the reader to see the whale as both the Leviathan of Job and the agent of God's vengeance in the story of Jonah.²

If one accepts the idea that Melville consciously created

¹Herman Melville, "Hawthorne and His Mosses," in Moby-Dick: An Authoritative Text. . . , ed. Harrison Hayford and Hershel Parker (New York: W. W. Norton & Company, Inc., 1967), pp. 535-51; this essay was already published in Duyckinck's Literary World, August 17 and 24, 1850; subsequent references to Moby-Dick are to this edition and will appear in the text.

²Natalia Wright, "Moby-Dick: Jonah's or Job's Whale?," American Literature, 37 (1965), 190-95; and Daniel G. Hoffman, "Moby-Dick: Jonah's Whale or Job's?," Sewanee Review, 69 (1961), 205-24.

ambivalent imagery, then one might reasonably assume that re-examination of his writing would uncover other carefully planned efforts to prevent the reader from satisfying the urge, so characteristic of that age in which Melville wrote, to pronounce quick moral judgment.

Part of the methodology he was able to learn from lawyers was the "science" of evidence. Jurists of the late 18th and early 19th centuries had carefully evaluated the sources of knowledge and of what, ultimately, could be relied upon when life, liberty, and property hung in the balance. Their conclusions were summaries of all the ways in which appearance might be deceptive and what steps might be taken to gain the greatest surety of truth. Within the Common Law there had evolved a set of rules for evidence, some of which had become law, some not, which sorted the reliable from the unreliable. These rules were an elementary part of every lawyer's training, and in that age of great public interest in law, they had even diffused to a certain extent into popular knowledge. Melville's proximity to men of the legal profession argues that he had even more opportunity than most to digest the information which amounted to a guide to practical epistemology. The present chapter demonstrates Melville at work systematically constructing ambiguities which the reader, as well as the protagonist, is prevented from solving because he is provided only with the kind of evidence that the most careful and practical thinkers on the

subject, the legal philosophers, had declared to be either unreliable or inconclusive.

If Melville had wanted to study the science of evidence thoroughly instead of merely gleaning the conversations of his friends, he could have found in the law libraries available to him several treatises on the subject which had been published since the turn of the 19th century. Most of these works were intended as practical guides for the lawyer, and, as such, they are dry and technical, filled with the minute cavils of common law pleading. Starkie's, Phillipps', and Taylor's books on evidence are of this nature.³ Judge Shaw's Boston acquaintance, Simon Greenleaf, published an American version of these manuals in 1842.⁴ Jeremy Bentham's five volume Principles of Judicial Evidence (1827) is, however, a somewhat controversial

³Thomas Starkie, A Practical Treatise on the Law of Evidence and Digest of Proofs in Civil and Criminal Cases (London: J. & W. T. Clarke, 1824); S[amuel] M[arch] Phillipps, A Treatise on the Law of Evidence (London: J. Butterworth and Son, 1814); and John Pitt Taylor, A Treatise on the Law of Evidence as Administered in England and Ireland with Illustrations from the American and Other Foreign Laws (London: A. Maxwell and Son, 1848). All of these works went through many editions, both English and American, throughout the 19th century, until they were superseded by the judicature acts of the early 1880's.

⁴Simon Greenleaf, A Treatise on the Law of Evidence (London: A. Maxwell and Boston: Chas. C. Little & James Brown, 1842).

philosophical evaluation of the system, in which he investigated its metaphysical basis as well as the soundness of its methods. But Bentham's style is so obscure and abstract as to make reading all five volumes tedious; and Bentham, too, became so technical in places that only a lawyer could have appreciated his point. Best's Treatise of the Principles of Evidence is the most handy work on the subject for one who wished to acquaint himself with the major characteristics of the system and at the same time gain familiarity with the general practice of the common law courts in presenting evidence and dealing with testimony. Best also provided the reader with philosophical discussions of his material, including critical summaries of Bentham's ideas about credibility and human understanding, especially with regard to "psychological facts".⁵

Since all of these books are about the common law system, it is not surprising that they all follow more or less the same plan of organization. It is easiest, therefore, to use that same plan here in providing a thumbnail sketch of the English rules for evidence as they were available in Melville's day. He himself, to judge from their use in Pierre, was following that exposition rather closely. Most of the references will be to Best's volume as the most contemporary (1849) and the most convenient summary.

⁵Jeremy Bentham, Rationale of Judicial Evidence Specially Applied to English Practice (London: Hunt and Clarke, 1827), I, 45-47, 145-46 and III, 6-11; for a concise presentation of Bentham's point, see W. M. Best, A Treatise on the Principles of Evidence. . . (London: S. Sweet, 1849), p. 9; subsequent references appear in text.

There were two main divisions of evidence with which the Melville student need concern himself. The first is direct and indirect, or circumstantial evidence; the second is the distinction between the original and unoriginal, or hearsay, evidence. In each of these categories there were kinds of evidence considered reliable and kinds considered infirm or unreliable.

Proof may be either direct or indirect, according to whether it offers the principal fact to be established or merely presents facts from which the principle matter may be inferred. Sometimes direct proof may be furnished by bringing objects or persons in question into court to be shown to the jury. A question as to whether something is black or white, one foot long or two feet long, etc., can be demonstrated simply by its appearance at the bar. In all cases where such "real evidence" can be produced, it must be presented before the court will hear any testimony about it. Not every matter to be proved is a simple physical fact, however; and in judicial procedure, whenever witnesses or documents attest to the principle fact, the evidence, when acceptable, is considered to be direct proof. In this category comes an eyewitness account or certified documents such as wills or deeds, depositions under oath, and the like. What remains in such cases is to establish the credibility of the witnesses or the genuineness of the documents.

The competency of witnesses, or the reliability of their testimony, was a matter for determination by the court. In legal termino-

logy, the competency of a witness must be distinguished from his credibility. There were well-defined cases in Melville's day in which the court, i.e., the judge, would not allow the witness to testify because of his mental condition or his interest in the case. In these categories fell children under seven years old, persons found non compos mentis, persons for whom an oath was not considered binding, as a convicted perjurer or one of no religious persuasion, and any persons having a legal interest in the principle matter of the case. In time much of the practice of barring witnesses from testifying because of incompetency was dropped because the courts came to regard the reliability of their testimony as questions of credibility which could be left to the jury to determine.

Indirect evidence, also known as circumstantial, may be conclusive, in which case it is taken as reliable. Best offers the following instances of circumstantial evidence which is conclusive in that necessary inferences can be drawn:

a female was found dead in a room, with every sign of having met a violent end, the presence of another person at the scene of action was demonstrated by the bloody mark of a left hand visible on her left arm; . . . a man was found killed by a bullet, with a discharged pistol beside him, the hypothesis of suicide from that pistol was negated by proof that the bullet which caused his death was too large to fit it. (Best, p. 224)

Circumstantial evidence is more often of a presumptive nature, however, and must then be handled with caution by the court. At

times such evidence furnishes a strong presumption; at other times it is so weak as merely to add weight to one side of the argument or the other. In a chain of evidence, each link must be examined as to whether it is conclusive or merely presumptive, and whether if the latter, whether the force of it weak or strong. In the case of burglary, for example, the thief opened the window with a penknife which was broken in the attempt, one piece of the blade being left behind, the other piece being found in the pocket of the prisoner; in another case, a man was killed by a pistol, the wadding found in the wound consisted of part of a printed paper the other half of which was found in the prisoner's pocket. In some cases, where the crime had to have been committed by a left-handed person, the fact that the accused is left-handed is taken as a presumption in favor of his guilt (Best, pp. 225-26). In each of these cases, the proof is not conclusive as other hypotheses could explain the circumstances. The inference drawn are not necessary, but only probable to some degree. The corresponding halves of penknife or the wadding might have been thrown away by the real culprit and picked up for some reason by the defendant; and, of course, there are many left-handed persons in the world. In cases of presumptive circumstantial evidence, the facts to be established are left to the judgment and conscience of the jury, who, however, are instructed by the court that they must decide the guilt of the accused beyond a reasonable doubt. Often such presumptive evidence is offered

along with other evidence of the same kind, and it is the weight of the total which causes the jury to risk inferences which are not necessary.

Most of these treatises on evidence divide the world of fact into two categories, the physical and the psychological. Physical facts are those properties derived from the inanimate nature of things. Psychological facts, on the other hand, are properties derived from the animate nature of beings. Motion, for example, is a physical fact because inanimate things, as well as animate, can have motion. But voluntary motion belongs only to animate beings and is therefore a psychological fact. Motives, intentions, feelings, persuasions, and beliefs are all psychological facts. The only direct proof available for establishing psychological fact is the testimony of the person who has experienced them. All too often that person is unavailable as a witness, either because he is deceased or because he has a barring interest. Most of the time psychological fact can be established only through circumstantial evidence, actions, words, deportment, interest, or premeditation, for example. Malice is one such fact which must be established through presumptive circumstantial evidence.

Proof could also be original or unoriginal. If it is original it was taken as reliable evidence, depending again upon the reliability of the witness or the genuineness of the document. But if it was unoriginal, derivative, or second-hand, it was considered

unreliable and in most cases, not even admissible. Original evidence was produced when a witness saw or experienced the fact he avers by personal observation. Even so, he was not permitted to give an opinion on what he witnessed, but merely to report the facts themselves. For example, a witness delivers original evidence if having read a certain letter, he can tell the court what it said. He may not testify as to the contents of the letter if he did not read it himself, and he may not speculate on the truth of what the letter said. Moreover, if the letter can be produced in court it must be read for its contents before the testimony of a witness is accepted instead. Again, a witness may testify that someone said something to him and what the words were, but the only evidence admissible is the fact of the words having been said at such and such a time. The words themselves, i.e., their meaning or any information contained in them is not admissible as testimony. For example, a witness may testify that A said she had a child by B, but this is not to be taken as proof that she in fact had a child, but merely that she said so on a certain occasion.

All unoriginal or second-hand evidence was considered unreliable, and Best declares this fact to be a peculiar characteristic of the English system (Best, pp. 120-21). In this category comes evidence by hearsay of which there were five types defined by the textbooks: supposed oral evidence delivered orally; supposed written evidence delivered orally; supposed written evidence delivered in writing;

supposed oral evidence delivered in writing; and reported real evidence (Best, pp. 23 and 369). The last of these occurs when a witness reports a piece of real evidence to exist, but it cannot, or is not produced in court. Best quotes Bentham on this subject:

To the reporting witness indeed, if his report be true, it was so much immediate, so much pure real evidence; but to the judge it is but reported real evidence. The difference is far from being a purely speculative one: practice requires to be directed by it. . . . The lights afforded, or said to have been afforded, are likely to be weakened in intensity and altered in colour by the medium through which it is transmitted. (Best, pp. 223-24; cf. Bentham, Judicial Evidence, III, 34)

Common law practice allowed several exceptions to the admissibility of derivative evidence, which, however, need not be discussed here as they involve technicalities not necessary to an understanding of the general rules.

Melville's first expression of interest in the problem of establishing facts by means of sound evidence comes in Typee when the young sailor hero finds he is unable to establish the truth about which of the tribes on the island were ferocious cannibals, because the only available witnesses are all interested parties given to accusing each other of the same thing. In the same volume he tantalizes the reader about whether his hosts were in fact cannibals by making sure that all such rituals were always kept out of his hero's personal observation. The bones that Tommo finds are presumptive circumstantial evidence, but it is only reported real

evidence, and it is only his opinion that they are human bones rather than the pig bones as the natives claimed. Tommo's opinion here is not reliable testimony, according to the rule that a witness may not speculate on what he saw, and the sailor was admittedly no expert on human anatomy. Concerning the validity of his narrative as a whole, Melville felt called upon to procure from his friend Toby an affidavit of corroborative testimony for publication with the assistance of lawyer Alexander W. Bradford.

In Mardi, Donjalolo, condemned to stay in his valley forever, is in the position of a court which must establish the truth not by immediate experience but by the evidence provided by others. The process is unsatisfactory and fraught with difficulties. He wishes to know what manner of reef lies around his island. He sends out two men to be his eyes. One returns bearing a piece of red coral, declaring this to be the color of the reef. The other returns with a piece of white coral declaring that this is the color of the reef. In this case there are two eyewitnesses, each offering a piece of real evidence. Both forms of evidence are of the kind designated as most reliable by the best rules of evidence. Babbalanja immediately credits both accounts and draws the necessary inference that the reef must therefore be both white and red.

There is a similar situation in the dilemma of the nine blind men who set out to see the world. Each of them, in examining the banyan tree, ought to have accepted the original evidence of the

others. If each averred that he had hold of the trunk of the tree, then the necessary conclusion, in the face of this reliable evidence, is that the tree had at least nine separate trunks. Both of these examples illustrate the principle that once the witness is credited and the evidence accepted as true, no conclusion or hypothesis ought to be drawn which leaves out any part of the evidence, no matter how inviting such an inference may be.

Mystery is preserved in the end of Mardi too because Taji can get no reliable evidence as to Yillah's fate. Hautia is his only eye-witness, and she is interested in the effect that the information has on his mind. When he peers into the whirlpool he thinks he sees a vague white shape in the water. This evidence forms only a weak presumption of Yillah's having thrown herself into the current as Hautia would have him suppose.

In Pierre Melville makes full use of the rules of evidence to create his primary ambiguity. Isabel's pedigree is the principle fact to be established. On that point hinges the entire plot. All of the evidence available to Pierre is unreliable as furnishing only weak presumption or coming from witnesses whose testimony cannot be credited, or as being unoriginal, second-hand evidence. The quality of this proof does not daunt Pierre, however, and Melville's comment upon his making momentous decisions under such conditions is significant for its details of imagery:

In the cold courts of justice the dull head demands oaths, and holy writ proofs; but in the warm halls of the heart one single, untestified memory's spark shall suffice to enkindle such a blaze of evidence, that all the corners of conviction are as suddenly lighted up as a midnight city by a burning building, which on every side whirls its reddened brands.⁶

If Melville had witnessed any of New York City's terrible fires or its aftermath, he knew from experience what awful destruction such a burning building could wreak. Furthermore, the comment clearly shows Melville aware that the evidence with which he had provided *Pierre* was exactly the kind that was not accepted in the "cold courts of justice".

The first information that *Pierre* has that Isabel is his sister is the letter she sends him (*Pierre*, pp. 61-65). The letter itself is no evidence, however; it is a mere declaration or accusation, and serves as the opening indictment.

The first piece of evidence that comes up for consideration are the death-bed words of *Pierre*'s father. Ordinarily a person's dying words are supposed to have more weight than other statements taken under oath, because it was held that a person dying is not likely to trifle with the truth when eternity is near (Best, p. 377). The words were not hearsay evidence for *Pierre* because he heard them

⁶Herman Melville, *Pierre, or the Ambiguities*, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston, Ill.: Northwestern University Press, 1971), p. 71.

himself. In this case, however, it was clear that Glendinning was not of sound mind, non compos mentis, being in a raving delirium. His words, therefore, were unreliable, and in a court of law, would not have been admissible as evidence.

The second proof Pierre has is his aunt's story about the chair-portrait taken of Glendinning when he was a young an eligible bachelor. Again, Pierre heard the words from his Aunt Dorothea's lips, but she reports hearsay. Her statement, in fact, is filled with phrases such as "some said. . . , others declared. . . , rumor began to hint. . . some who shook their heads . . . (Pierre, p. 76). All of the story came to his aunt through the painter Ralph's speculations. The portrait itself, though a piece of real evidence, is proof only of Ralph's notions. The aunt's testimony would fall into the category of supposed oral evidence delivered orally. The painting itself is supposed oral delivered through "written". Melville calls the painting a "shadowy testification" of the fact in the countenance of the original" (Pierre, p. 82), thus indicating that he is aware that it is unsound, because unoriginal, evidence.

The third piece of evidence is circumstantial. It is the aversion Pierre's mother has to the chair-portrait. This evidence too is merely evidentiary of the principle fact. It is certainly not conclusive of anything except that Mrs. Glendinning did not, as she averred, think the painting was a good likeness of her

husband. If Ralph the painter had been carried away with his own romanticisms---those shared by the spinster aunt---Mrs. Glendinning may very well have been right in her estimate of the portrait.

Isabel's story is specious in many respects. First, she is the principal in the case and, as such, her testimony is unreliable. Whatever she says against herself would be acceptable, but not what she says for herself (Best, p. 393). None of her story can be corroborated by witnesses or attested by any acceptable evidence.⁷ Much of her recollection was from experience dating back to when she had been a mere infant, and for that reason, unreliable and inadmissible (Best. pp. 172-81). Furthermore, parts of the story suggest that she had been confined in a madhouse at one time, raising the question as to whether she had been of sound mind during the time she was recalling (Best, pp. 166-71). In addition, she tells Pierre that she was raised without religion. As a irreligious person, she would be judged an incompetent witness on the grounds that she lacked an important sanction for veracity and that no oath would be binding upon her. Her story is suspiciously vague and indistinct throughout (Best, p. 498). Finally, her reputation and thus her credibility is impugned by her association

⁷Best, p. 65; Best offers the opinion that supporting witnesses are optional but desirable in English law (cf. pp. 425-26); Bentham, however, insists corroborating witnesses are required (I, 63 and II, 337).

with Delly Ulver, a fact that she herself points out to Pierre (Pierre, p. 157).

Melville's art is brough to bear more than once in handling Isabel's story. During the interval between his two interviews with Isabel, Pierre visits the Memnon Stone. Graven on the rock are the initials "S. ye W.". Pierre laughs when his whitehaired city kinsman pronounces the author of these letters to be "Solomon the Wise," but his merriment might not have been so careless had he remembered the substance of the story which gained Solomon his reputation for wisdom. Best's treatise on evidence recounted the tale of Solomon acting as judge in a case of disputed parentage. He orders the child cut in two and half given to each of the two harlots claiming to be its mother. When the order was given, one mother showed by her deportment that she had deep maternal feelings for the child (a psychological fact); the other, that she had none. Solomon considered their behavior to be strong presumptive evidence in favor of the first, and decided that the child was hers. The story is given by the books on evidence as an example of a case decided by the judge without direct proof or corroborating witnesses. The decision was regarded by commentators of the English common law system of jurisprudence to be a precarious mode of dealing justice.⁸ The Memnon Stone is in precarious balance, and Melville waggishly

⁸Best, p. 429fn; cf. Pierre, p. 133.

tells us that the aged kinsman reached his conclusion about the author of the initials only after solemn deliberation on the stone's angle of inclination and upon several verses from Ecclesiastes, the theme of which most likely was the vanity of man's wisdom. At any rate, the Memnon Stone ought to remind Pierre that one should have the wisdom of Solomon to decide a case without witnesses.

Another instance of Melville's using literary skill to point up the unreliability in Isabel's testimony lies in his treatment of the handkerchief incident. Isabel states that she knew her father's name to be Glendinning because the man referred to as "the gentleman" or "father" (she is vague about this too) dropped his handkerchief while visiting her one day, and the farm wife gave it to Isabel without noticing that his name had been embroidered upon it. Pierre does not ask to see the handkerchief, nor does Isabel produce it. Here too is a piece of derivative evidence of the kind designated "reported real evidence". The textbooks on evidence felt called upon to give extra explanation, as we have seen in the case of Bentham's work (Bentham, Judicial Evidence, III, 513-21) to the problems of reported real evidence, probably because such accounts have a ring of truth about them. Lest the reader give Isabel's story too much credit because of her claims about the handkerchief, Melville provides him with a similar but much more extravagant claim. Isabel tells Pierre that she knows her name is Isabel because she found it graven inside a guitar which came from

Saddle Meadows. This conceit demonstrates her ability to spin fact out of the most tenuous presumptions. Advice on cross-examination given the young attorney in Best's book on evidence suggests that the enthusiastic witness be permitted to continue his testimony until he makes the mistake of making some unbelievable claim that reveals his unreliability as an informant (Best, pp. 492-93 and 500-501).

Near the end of the book, while making a chance visit to an art gallery, Pierre comes across a portrait of the foreigner. The resemblance between this second anonymous painting and Isabel suggests to Pierre his foolishness in not seeing how little weight he ought to have attached to the similarities between Isabel and the chair-portrait of his father. His coming across the second portrait points up the nature of the first as being only presumptive, and far from conclusive, circumstantial evidence.

This latter incident causes Pierre to review the entire basis for his decision about Isabel's pedigree. This passage is significant because here Melville uses the terminology of the textbooks on evidence in Pierre's excoriation of himself for jumping to unwarranted conclusions:

How did he know that Isabel was his sister? Setting aside Aunt Dorthia's nebulous legend, to which in some shadowy points, here and there Isabel's still more nebulous story seemed to fit on,--- though but uncertainly enough---and both of which

thus blurredly conjoining narrations, regarded in the unscrupulous light of real naked reason, were anything but legitimately conclusive [italics mine]; and setting aside his own dim reminiscences of his wandering father's death-bed; (for though, in one point of view, those reminiscences might have afforded some degree of presumption as to his father's having been the parent of an unacknowledged daughter, yet they were entirely inconclusive [italics mine] as to that presumed daughter's identity; and the grand point with Pierre was, not the general question whether his father had had a daughter, but whether, assuming that he had had, Isabel, rather than any other living being, was that daughter;)---

The passage continues to these conclusions:

and setting aside all his own manifold and inter-enfolding mystic and transcendental persuasions, . . . and coming to the plain palpable facts,---how did he know that Isabel was his sister? . . . The chair-portrait, that was the entire sum and substance of all possible, rakable, downright presumptive evidence [italics mine], which peculiarly appealed to his own separate self. Yet here was another portrait of a complete stranger---a European; a portrait imported from across the seas, and to be sold at public auction, which was just as strong an evidence as the other. Then the original of this second portrait was as much the father of Isabel as the original of the chair-portrait. But perhaps there was no original at all to this second portrait; it might have been a pure fancy piece; to which conceit, indeed, the uncharacterizing style of the filling up seemed to furnish no small testimony. (Pierre, p. 353).

Melville demonstrates in this passage his lawyer-like knowledge of the science of evidence. This section, along with his earlier comment that the proofs would not have been accepted in "the cold courts of justice" and his references to the judgment of Solomon,

shows that Melville was well aware from the start that he had been furnishing his hero with what the rules of evidence rejected as unreliable.

Prompted by fresh doubts Pierre is led to cross-examine Isabel. He finds her lacking in knowledge of details she ought to have known if her story were true. She does not know, for example, that the sea was salt, rendering improbable her account of having crossed the ocean at one time. Pierre concludes that Isabel's story, taken in aggregate was really an "immense staring marvel" (Pierre, p. 354). There is no way for the reader to settle the question any more than there is for Pierre. But Pierre has unwisely acted upon his faulty evidence and is accused by the staring face of Plinlimmon of being a fool (Pierre, p. 293), an epithet which Bentham defined as the following:

Correspondent to the believing of improbable things, is the doing of foolish ones: what the one is in theory, the other is in practice. Foolish belief, if there be any such thing, what is it? It is neither more nor less than the belief of improbable things. (Bentham, Judicial Evidence, I, 135-36)

Elsewhere Bentham discourses upon the foundation of all our knowledge, which he says is experience. The following comment seems particularly applicable to Melville's treatment of Pierre:

. . . to credit, on no better ground than because this or that person or persons have asserted it, a fact, the superior incredibility of which is attested by experience. This is, in other words, to throw off the character of

rational beings, and in cold blood to resolve to act the part of madmen.⁹

Pierre, who calls himself the "Fool of Truth" (Pierre, p. 358), causes Isabel to think him slightly mad (Pierre, p. 273); his friend Charlie Millthorpe worries about his state of mind, and Pierre himself comes to doubt his own sanity. Melville tells us that he is afflicted by a "dark, mad mystery in some human hearts, which, sometimes, during the tyranny of a usurper mood, leads them to be all eagerness to cast off the most intense beloved bond, as a hindrance to whatever transcendental object that usurper mood so tyrannically suggest" (Pierre, p. 180). Then whoever yields to such forces within himself becomes guilty of a "senseless madness" (Pierre, p. 181).

In discoursing upon the foundations for belief in the veracity of witnesses' testimony, Bentham, like other commentators on the science of evidence, reviews the force of the moral sanction against perjury (Bentham, Judicial Evidence, I, 209-21). What is particularly noteworthy in his rambling discussion is the comment,

Of the degree of force with which the moral or popular sanction acts in support of the law or the rule of veracity, a more striking or satisfactory exemplification

⁹Bentham, I, 131-32; this section in Bentham's Judicial Evidence is a disquisition on the innate propensity in mankind to believe what is said by others, parts of which sound like a description of the plot of Pierre (I, 126-36; esp. pp. 127 and 134-35).

cannot be given, than the infamy which so universally attaches upon the character of liar, and the violent and frequently unsupportable provocation given by any one who, in speaking to, or in the presence of, another, applies to him that epithet. (Bentham, Judicial Evidence, I, 210)

He goes on to say that this provocation is rather more than less if the person to whom such an epithet is applied knows he deserves it. Pierre's course of action demanded that he be a liar from the very start, in representing Isabel as his wife. He is accused at the end of the novel of being a "villainous and perjured liar. . . . a liar;---liar, because that in itself is the scornfullest and most loathsome title for a man; which in itself is the compend of all infamous things" (Pierre, pp. 356-57).

Bentham lists four reasons when popular morality allows lying, in fact, prescribes it: falsehoods of humanity, to spare pain of mind; falsehoods of urbanity, to avoid discouraging young artists; falsehoods of prudence, to keep information to which another has no right; and falsehoods to prevent evil, to conceal a persons whereabouts from a would-be assassin (Bentham, Judicial Evidence, I, 219-20). All four species of sanctioned lying are to be found in Pierre. The hero's resolve not to tell his mother or Lucy that Isabel is his sister is to spare them pain of mind. Ralph, the painter of the chair-portrait, withholds information from Mr. Glendinning as to whether he has painted such a picture. He does so out of prudence, lest it be destroyed, and he uses the excuse

that Glendinning had no right to the information. Pierre himself is the victim of falsehoods told a young poet so as to encourage him in his work (Pierre, pp. 244-46). Glen Stanly lies when he denies knowing Pierre, prudently wishing to avoid entanglement in Pierre's disgrace. Finally Pierre lies in saying that Isabel is his wife in order to avert the greater evil of ruining her reputation or that of Lucy, who has come to live with them. At the end of his discussion on moral sanctions for mendacity Bentham makes the following comment:

A disquisition of no small length and intricacy might be employed on the subject of the exceptions to be made to the general rule of veracity: a disquisition, curious and interesting at any rate; but, whether subservient or not upon the whole to the interests of morality and happiness, would depend upon the manner in which it was conducted. (Bentham, Judicial Evidence, I, 221)

If Melville took this hint from Bentham as a wonderful idea for a novel, he would have done better to have heeded its warning as well. Bentham won continuing censure for daring to explore the frontiers of morality in so dry and technical a work as a treatise on judicial evidence. To attempt a "disquisition" on such a subject using the form of a romantic and "supersensuous" novel would have seemed to a less rebellious author than Melville a mode little calculated to keep the work "subservient to the interests of morality and happiness" as Bentham advised.

Before leaving Pierre, it is appropriate to say a word about

the characterizations of women in the novel. It is true that both Lucy and Isabel owe a great deal to stereotypical romantic heroines, and to Melville's own predilections, as had been suggested; he, after all, was raised in that romantic atmosphere himself. Books on the science of evidence, however, all include a section on the testimony of women (Best, pp. 63-64 and 171-72), much to their prejudice as witnesses. Women, the attorney is warned, are notorious for their predisposition to exaggerating and for being devious in general. The history of the rules of evidence shows that until comparatively recent times, women were not even permitted to testify under the civil law of the continent for this reason. Isabel's ability to build merest shreds of suggestion into an "immense staring marvel" are not at variance with this view of women. Aunt Dorothea's fond romanticizing, the Misses Penniman's penchant for gossip, the devious practices of Lucy's match-making mother also fit the type. It is probably no accident that Lucy, who becomes distinguished for practical sense in getting her way, has the Scottish name Tartan, which suggests the source of this strength. Mrs. Glendinning, who Pierre imagines will be a formidable foe in a court of law, has, as Melville made a point of telling us, "a reserved strength and masculinity" in her character (Pierre, p. 180).

Although "motive," a kind of psychological fact, also comes into question in Pierre, the central ambiguity which Melville con-

structs by making a perverted use of the rules of evidence is a physical fact (Isabel's pedigree). In Moby-Dick, however, the principle fact to be established is psychological: is the whale guilty of intentional homicide and malice aforethought. Since the whale is a dumb brute he can offer no testimony at all. Thus no direct evidence of the main fact is possible. Only indirect, or circumstantial, evidence can be brought to bear. Even so, Melville apparently took care that all the evidence he presents for the case against the whale is in one way or the other deemed unreliable or inadmissible by "the cold courts of justice".

At times Melville conducts the narration of Moby-Dick as though he would have us believe that Ishmael were a lawyer rather than a schoolmaster. In such chapters as "The Affidavit" or "Moby-Dick," for example, in "Fast Fish and Loose Fish" or "Heads or Tails," in "The Advocate" or "Ambergris," in "The Decanter" or "A Bower in the Arsacides," as well as many others, the narrator presents his material as though he were unfolding a brief at the bar. Even so, all of the evidence offered is circumstantial, inconclusive, or downright unreliable.

Let us first consider Ishmael as a witness. So far as his personal experience goes he is competent to testify to most matters in the book. However, he is not a competent witness concerning the principle fact to be established, the whale's malice. because he is an interested party by virtue of his pact with Ahab. He is

an accomplice in the vindictive hunt. He may testify against himself and Ahab, as to the captain's madness or whatever incriminating actions may be attributed to the crew of the Pequod, but whatever he says for himself or the others and against the whale must be taken as unreliable testimony. Ishmael admits that he had become afflicted with Ahab's "quenchless feud" (Moby-Dick, p. 155). Starbuck too is overheard to say that for the men of the hunt "the whale is their demogorgon" (Moby-Dick, p. 148). Obviously, Ishmael's eye-witness account had to be flavored by his sympathetic involvement as a participant.

Ishmael is not merely an eye-witness, however. It has been noticed frequently that the narrative voice changes, or splits, after the book has begun. Most critics have judged the incompleteness of the change an artistic flaw; without, however, contradicting the aesthetic judgment of such commentators, some glimpse of Melville's purposes might be afforded here. After the revisions he began in the fall of 1850, he appeared to be putting the whale and Ahab on trial. The narrator assumes an attorney-like air in prosecuting his case, but also becomes a series of "expert" witnesses, a geologist, a cetologist, an archaeologist, a professor of whale anatomy, a phrenologist, and so forth, as the subject demands. In the role of the geologist, he is even careful to present his credentials to the "court". In the chapter "A Bower in the Arsacides" he becomes the judge, questioning himself viva voce for his competency before

allowing testimony to proceed (Moby-Dick, p. 373). In "The Advocate," "The Affidavit," "Moby-Dick," and others in which the case against the whale is offered, Ishmael acts as the prosecuting attorney. In the sections which present Ahab's monomania (especially "Surmises") and the whale's normal docility, domestic life, and ordinary good nature, he appears to switch sides and play counsel for defense. Thus "Ishmael" plays not just a dual, but a multiple role in as many poses as Melville's trying of the case requires. In addition to all these Ishmael's there is still the authorial intrusion which presents soliloquies by Ahab, Starbuck, Stubb, Pip, and Flask, besides certain transactions in the cabin which it is not reasonable to assume that Ishmael could have overheard.

The question then arises here as to how original is the evidence which Melville offers in Moby-Dick. Because of the nature of any book as a written instrument per se, whatever is written in it is the author's testimony. Melville offered his oath as to the veracity of Typee and Omoo, plus the affidavit of a corroborating witness. He was at pains to disclaim strict adherence to the truth in Mardi, and then concerned himself little with public controversy over the validity of his experience in Redburn or White-Jacket.¹⁰ But Melville, or the Ishmael-narrator of

¹⁰Jay Leyda, The Melville Log: A Documentary Life of Herman Melville, 1819-1891 (New York: Harcourt, Brace, 1951), I, 214, 221, 226, and 233.

this particular chapter "The Affidavit," takes care to present his testimony in quasi-legal form and to distinguish the two items in his account which are of personal observation (Moby-Dick, pp. 175-76). That Melville was aware he could offer only two pieces on his personal recognizance and felt called upon to say so indicates that he was conscious that the rest of the information in the chapter is hearsay, or unoriginal, evidence, and, as such, to be taken as unreliable. The self-interrogation in "A Bower in the Arsacides" is another demonstration of Melville's knowledge of the important difference between first-hand and second-hand information.

Ishmael is competent to testify to every matter of which he has first-hand knowledge, except the fact of the whale's malice. Whatever he offers as either protagonist or omniscient narrator which comes from the experience of others, whatever he offers by way of surmises, whatever is presented that Ishmael could not reasonably have seen or heard himself, whatever he reports about real evidence (such as paintings and artifacts) is not by definition reliable or in some cases even admissible testimony.

There is other indication, besides the problem of Ishmael as a witness, that Melville kept in mind the rules of evidence while composing Moby-Dick. The first inkling that Ishmael receives of the feud between Ahab and the whale is in his conversation with Captain Peleg prior to signing aboard the Pequod. The confronta-

tion involves a dual cross-examination between Peleg and Ishmael. The former questions Ishmael on his whaling experience and will not allow Ishmael to assert that he knows about whaling simply because he has been in the merchant marine. Ishmael returns the point, chiding Peleg for his surprise that the inexperienced sailor does not know about the fierceness of the white whale:

. . . "What you say is no doubt true enough, sir: but how could I know there was any peculiar ferocity in that particular whale, though indeed I might have inferred as much from the simple fact of the accident."

"Look ye now, young man, thy lungs are a sort of soft, d'ye see; thou dost not talk shark a bit. Sure, ye've been to sea before now; sure of that?"

(Moby-Dick, pp. 69-70)

The entire interview between Ishmael and Peleg emphasizes the important difference between first-hand and second-hand information.

The next bit of evidence concerning the nature of the voyage on which he is about to embark comes by way of the mad Elijah. All of Elijah's "knowledge" is mystical. He knows nothing by experience, and, because he is of unsound mind, his testimony is worthless anyway. Ishmael himself declares Elijah's ravings are just so much humbug. Whatever is offered by other mad persons throughout the book must be discredited for the same reason. The prophecies of the insane Gabriel are discounted on the spot by the narrator as being but generalizations come true only because of the commonness of the predicted accidents in the whale fishery.

Testimony offered by infidels and pagans is equally unacceptable because it comes from irreligious persons. Those who are fireworshippers might be said to believe in a god, yet that god (the Satanic) is the greatest liar of all and gives no sanction to veracity when it is not to his purposes. Queequeg's religion is questioned by Peleg and Bildad when it come time for the savage to bind himself under oath to the ship's articles. Ishmael jollies the captains out of their scruples; but in giving more elaborate consideration to the Polynesian's island religion, he takes care to point out the peculiarly casual and fearless relationship the cannibal has with his idol. Whatever any of these infidels has to testify is not creditable information.

The chapter "Moby Dick" has been analyzed as Melville's exploration of the process of myth-making, and indeed it is an exercise in reviewing the sources of credibility. He asserts that men have been known to credit many strange ideas about the whale. Looking into Bentham's discussion of the problems of credibility, a section titled "Of Improbability and Impossibility" (Bentham, Judicial Evidence, III, 258-384), one finds the forms of improbable information used by Melville.

Bentham theorized that the foundation of all knowledge was experience. Likewise our belief in something which we have not experienced is conditioned upon what experience we do have (to which we can compare the new fact) and also upon our powers of

faith. What one man thinks impossible, another may credit. He gives several examples of foreign travelers finding that even highly educated persons of a warm climate would not believe that water may be turned into a hard, brittle substance we call ice. Yet, having a simple faith in flying carpets or similar witchcraft which could counteract the power of gravity, other men found no difficulty at all in believing in the great ascension balloons they had never seen. Melville remarks upon this idea in Pierre in explaining how it was that his hero could not comprehend the meaning of Plotinus Plinlimmon's pamphlet upon the first reading:

If a man be told a thing wholly new, then---during the time of its first announcement to him---it is entirely impossible for him to comprehend it. For---absurd as it may seem---men are only made to comprehend things which they comprehended before. . . .

(Pierre, p. 209)

Thus, what a man believes or does not believe, comprehends or does not comprehend, depends upon his previous experience. Melville explains in "Moby Dick" and "The Affidavit" how lands men or even sailors not acquainted with the whale fishery are incredulous of the prodigious size and fierceness of the animal and will not credit the reports of those who have first-hand knowledge. Bentham also asserted that one can never declare any fact to be impossible, but only highly improbable enough not to warrant credit. The degree of probability one assigns to a particular fact may also be a function of his willingness to credit marvels or from per-

sonal interest to credit that particular fact. Bentham warned that the danger men face in this matter of belief is twofold: one may discredit true facts (such as ice) merely from ignorance or lack of experience, or one may be too willing to credit false facts out of a susceptible disposition to believe or out of wishful thinking. Melville's essay on "Faith and Knowledge" in Mardi plays with the problems of credibility in a similar fashion, and of course the whole career of Pierre is a demonstration of what fools men can be about believing improbable things. If a judge is to err, it is better that he err on the side of skepticism than gullibility, and the chances of his making such error in the first place are reduced if he follows some of the simple rules of evidence as developed by legal science.

In "Moby Dick" Melville tells us that some men believe the whale to be ubiquitous. This notion falls into a class of facts which Bentham says are not impossible, yet are to be regarded as so highly improbable as not to be credited because they are against all the known laws of nature. But Bentham is careful to add that mankind has not yet nor may never attain to complete, perfect knowledge of the laws of nature. Such facts, therefore, must be rejected as improbable, but not utterly impossible. The same applies to immortality, and Bentham sarcastically alludes to Christianity as a modern faith which, in at least one instance, assented to the notions of both ubiquity and immortality in a man.

Bentham also discusses the report of exaggerated size or unusual characteristics in one of a species. In known species man has an experience of the range of size one might expect to find (Bentham, Judicial Evidence, III, 299-301 and 310). One could sooner give assent to prodigious size or bizarre characteristics in an unknown sort of animal (if one accepts the existence of such an animal at all) than to such gross deviation in a kind with which one has fairly common experience. One might give assent to a 30 foot unicorn, for example, more readily than to a 30 foot rabbit. Melville warns the reader against accepting the doubts of whalers as to the enormous size and intelligent ferocity of the sperm whale, if they are not experienced in hunting this particular species, but have chased only the right whale or some lesser variety.

Bentham is known for one other peculiarity in his theories about the problems of credibility which are rejected wholesale by other legal philosophers probably for the reason that it tended to undermine faith in rational judgment. Bentham suggested that men cannot fix the point at which credibility begins and ends, that the point of decision is lost in the shadows of a gradual transition (Bentham, Judicial Evidence, III, 296-97 and I, 74). Melville frequently uses twilight or shadowy gray imagery when creating an atmosphere of doubt, distrust, or ambiguity; long passages of "Benito Cereno," the opening pages, for example, is

one such instance. In Billy Budd he compares the problem to that of analyzing our perceptions about the rainbow. We know one side is orange and the other violet, but we cannot distinguish just where one becomes the other.¹¹

Bentham gives two simple examples of when this aspect of our perception creates a problem of credibility. He says that one might agree that a man could be eight feet tall; but then if eight feet, why not eight feet, one inch; and if eight feet one inch, why not eight feet, two inches; etc.? No one knows where assent might stop if conducted in this fashion. Moreover, for each man, the critical point might fall out a little differently depending upon his own disposition to credit great height in a man or to resist crediting it. Again, the same might be true of age. If one credits the fact that a man lived to be 149 years old, why not believe 150; if 150, why not 151, etc., and who knows where one would be willing to draw the line. Bentham leaves the question a mystery which he says every judge must solve for himself when the time comes; yet in doing so, the judge may be guilty of some irrational decision arising out of his mood or particular sensibilities. The problem remains when one is dealing with more subtle qualities or quantities than inches or years. Having

¹¹Herman Melville, Billy Budd, Sailor (An Inside Narrative), ed. Harrison Hayford and Merton Sealts, Jr. (Chicago and London: The University of Chicago Press, 1962), p. 102.

presented his reader with other instances of cunning, size, malignity, and ferocity of the sperm whale, Melville then invites him to believe in Moby Dick, who is just a little bit larger, a bit more ferocious, a bit more intelligent, and perhaps a bit more malicious than any other whale, being, as Captain Peleg would have it, "the monstrousest parmacetty that ever chipped a boat" (Moby-Dick, p. 69). There is in fact no reason why he should not if he believes the other stories. One real problem with which the reader is confronted is where to mark the point at which natural ferocity and instinctive self-preservation become so terrific as to constitute the kind of excess one might be justified in calling malice, or demonism. The decision, if Bentham is correct, may have to be essentially irrational.

Seen in these terms, parts of Moby-Dick are an essay, or "philosophical novel" about the problem of belief, utilizing the grounds of ultimate uncertainty suggested by legal thinkers on the subject, especially Bentham. Belief in the truth or falsehood of a fact, as we shall see in "Benito Cereno" and as we have seen in Pierre, is a matter of personal liability to giving assent, since nothing may be said to be impossible, but merely more or less probable. Since in many types of problems in credibility no point of decision may be rationally fixed, Bentham's ideas tended to make mockery out of the cherished judicial convention, that in cases where proof is not conclusive, especially in cases woven purely out of presumptive circumstantial evidence, the jury and the

court must deliver its verdict beyond a reasonable doubt. Faith, belief, doubt, in Bentham's opinion were not rational, or reasonable, operations of the mind.

At the end of the chapter "Moby Dick" Ishmael laments that to explain just how it was that the crew so "aboundingly responded" to the old man's ire, so that "his hate seemed almost theirs" would be to dive deeper than Ishmael can go" (Moby-Dick, p. 162). Belief is inexplicable, and as all knowledge is but hearty belief, there is no teacher but experience to help men separate truth from falsehood.

The notion that knowledge, especially of the ideal, has its source in the irrational operations of the mind did not originate with Bentham. Philosophers such as Origen and the neoplatonist Plotinus had pointed out the mystical element in Plato's theories of the way the mind apprehends the "forms". Since Melville named the author of the pamphlet in Pierre Plotinus Plinlimmon, one might be justified in assuming that he was aware of this philosophers theories and perceived that they were what moderns would call transcendental. His practical methodology on the subject though was far more likely to have come from the widely read and contemporary Bentham than from tedious, metaphysical, latin essays.

In "Benito Cereno" Melville systematically employs the method of presenting Delano with presumptive, but not conclusive, circumstantial evidence. All of the proofs the captain receives are

original, being either real or the testimony of persons present and able to be cross-examined and observed while delivering their story. Of course, all the witnesses are lying, either from ulterior motive or coercion; they construct what Bentham would call a highly improbable, but not impossible, situation. Delano's position resembles the situation to which every court is liable in its attempt to establish the truth. Even employing acceptable precautions, such as cross-examination and attempts to get corroborative testimony, Delano fails to see the real situation, until he is told the truth by Don Benito himself, and even then his good nature remains incredulous.

Delano's benevolence makes him predisposed to find innocent alternatives to every piece of circumstantial evidence that comes under his nose. At first mere lack of suspicion prompts him to adopt pleasant explanations for each equivocal fact. As matters progress and the weight of so many of these details begins to accumulate, he is forced more and more to fall back upon his good nature to supply the benefit of the doubt. The trouble is, Delano's temperament makes him more liable to believe good than bad.

As Bentham suggested, nothing is impossible, only more or less probable to man as his experience or his disposition dictates. Delano refuses to credit stories of ships lured to destruction by pirates affecting distress (although the suggestion deepens his

apprehension). So much more then he finds it an "incredible inference that every soul on board. . . was a carefully drilled recruit in the plot."¹² Delano is correct in finding this inference so highly improbable as not to be credited, but far from being impossible, this explanation, as the reader learns, was the most nearly correct.

At another time the crashing of the hatchets, the knelling of the ship's bell, the environment of the cabin, all seem portents of evil to Delano, but then some cheering incident of more than equal sway with his good nature, such as the beautiful breezes, the arrival of his familiar longboat, his compassion for Don Benito's suffering or admiration for Babo's apparent devotedness, move him to dismiss such forbodings. Melville implies that it is Delano's charity which causes him to retain his confidence in Benito Cereno.

The reason behind the demand for original and the rejection of hearsay, according to nineteenth century treatises on evidence, is not simply the sanctioning power of an oath or the element of personal responsibility in giving testimony. The best evidence will come from a witness who is actually present, because he can then be cross-examined and the jury can observe his deportment in

¹²Herman Melville, "Benito Cereno," The Piazza Tales, in The Works of Herman Melville, Standard Edition, X (New York: Russell & Russell, Inc., 1963), p. 99; subsequent references to this edition appear in the text.

giving testimony (Best, pp. 107 and 373). For this reason, depositions under oath are acceptable only if the witness cannot be present, but not acceptable if the witness can be called into court to make his declarations in person. Similarly, the testimony given at a previous trial is acceptable, but not worth as much as if the witness were called in to a new trial (Best, p. 373). The deportment of the witness could have furnished an important source of evidence for Delano if only his good nature had permitted him to read the signs correctly. As it is he can only find illness, lunacy, or wicked imposture (to him incredible) as explanations ("Benito Cereno," p. 92. Don Benito's furtiveness, nervousness, or alteration of good and bad manners furnished the clues as to the falseness of his testimony. Delano dismisses this as the result of his foreignness or illness. Likewise the sneaky aspect of the "whiskerando" sailor he attribute to sheepishness at being caught not paying strict attention to duty ("Benito Cereno," pp. 104-105). Babo's devotion to being near the Spaniard is explained as the act of a faithful servant. Melville supplies Delano and the reader with plenty of incongruous deportment he could make use of if he were able to sustain suspicion.

At a certain point in the story Delano pauses to add up unexplained incidents. Two of these argue the Spaniard's absolute control of the ship: his demand for an apology from the enormous Atufal, and the cringing submission of all in the ship. Two

suggest that the Spaniard has no control at all: the affair of the Spanish lad assailed with a knife, and the trampling of the sailor by two negroes. Rightly these seem contradictory to Delano, who, had he been as familiar with the rules of evidence as Melville appears to have been, should never have dismissed the discrepancy without getting to the bottom of the matter. Once again Captain Delano's good nature intrudes; he concludes that the captain is the most capricious he has ever seen, but he excuses him in the light of his prejudiced notion that Spaniards all seem odd and "Guy-Fawkish" to him, but are probably "as good as any folks in Duxbury, Massachusetts," just the same.¹³ His familiar longboat arrives and puts an end to his reverie by its heartening appearance.

When Delano seeks corroborative testimony from the sailors he must interview them while they are surrounded by the blacks. The sailors, fearing for their lives, and Delano's as well, can make no reply except those rehearsed in Babo's supervision. Their deportment, as noted, is important evidence for Delano, but he manages to explain this too in terms of pleasant alternatives.

¹³"Benito Cereno," p. 113; the contradictions outlined above are also in Delano's account of the incident; it is Delano's motive for dismissing them which is the subject of Melville's elaborations; for further comparison of Melville's story with its source, see David D. Galloway, "Herman Melville's Benito Cereno: An Anatomy," Texas Studies in Language and Literature, 9 (Summer 1967), 239-52.

He finally gets to cross-examine Benito Cereno on some of the details of his voyage. The Spaniard contradicts himself on the subject of the gales off Cape Horn; but before Delano can properly follow up this brief intelligence, Babo intervenes with the shaving ritual, thus forcing the Spanish captain to resume testimony with a razor at his throat. Don Benito does not permit Delano to cross-examine him really, but continues by rehearsing his story once more and making mere repetitions, some less qualified than before. Thus Delano's unskillful attempt at cross-examination is easily thwarted by Babo.

Melville changed the name of Delano's ship from the Perseverance, which it is called in Delano's Voyages, to Bachelor's Delight. Since one of the meanings of "bachelor" in 1856 (NED) was novice or apprentice, specifically with reference to the bachelor of law degree handed out to the new graduates of the inns, the new name of the ship is obviously a token of Delano's naivete and pleasant, optimistic disposition. Both of these elements in the American's character are critical factors in determining the course of his judgments throughout the story.

At the end of the account in the Voyages, Captain Delano attached various documents from the legal proceedings in Lima which investigated for him the affair of the slave revolt. He includes these papers partly in the interest of demonstrating the truth of his account. Melville also ends his version of Don

Benito's story by appending depositions from the trial of Babo and his cohorts. He does so, however, with a view to contrasting the true events with the appearances the events had for Delano. Among the alterations Melville makes in the documents as found originally in Delano's book, it is significant that many are made with no other purpose in mind than to bring the testimony into conformity with the English rules of evidence. In such fashion Melville once more displays knowledge of these rules. A few of the modifications he made are noted below.

First, the Spanish court in Delano's version did not question the veracity of Don Benito's account for any reason. Melville, on the other hand, says that the court at first rejected Don Benito's story "for natural and learned reasons" ("Benito Cereno," p. 149). The Spaniard's probity, according to Melville, was doubted on the grounds that illness might have affected his mental competency. The court concluded that he had thus "raved of some things which could never have happened" ("Benito Cereno," p. 149). On the strength of corroborative testimony, the tribunal finally gave credence to Don Benito's statements. Thus even the court decided some things impossible which were only highly improbable and which were nevertheless true.

Second, the Spanish deposition, as tendered by Delano, contains only one instance in which a reported "fact" was verified by the phrase "and that this was known, because the negroes have said

it"¹⁴ In contrast, Melville uses this verification five times altogether, with one wording or another, so that every detail of the story presented in the deposition is given as good evidence. Furthermore, in "Benito Cereno" the original phrase is expanded to read " that this is known and believed (*italics mine*), because the negroes have said it" (Benito Cereno," p. 162-63).

Other small changes in the text of the deposition bear out the notion that Melville was carefully regarding the rules of evidence in rewriting Delano's material. The Spanish version of the statement reads at one point, "two negroes went down to the birth [sic] of Don Alexandro, and stabbed him in his bed; . . ." (Delano, p. 336). Melville deletes the second detail, rendering the line, "those two went down with hatchets to the berth of Don Alexandro; that yet half alive. . . etc." ("Benito Cereno, p. 170). No one saw these men injure Don Alexandro in his berth, so Melville omits this assertion from the testimony. According to English rules of evidence, testimony as to what was done in the cabin would be mere speculation and as such, unacceptable in courts of law.

Finally, Melville adds to the account Benito Cereno's aversion to the sight of his former tormentor, Babo. The Spanish captain could not even be made to look at the culprit, and true to his

¹⁴ Amasa Delano, A Narrative of Voyages and Travels in the Northern and Southern Hemispheres. . . . (Boston: Amasa Delano, 1817), p. 340.

careful design of correct and incorrect presentation of evidence, Melville is quick to add that Babo's legal identity, therefore, rested upon the testimony of the sailors alone ("Benito Cereno," p. 170).

At the end of the story the two captains discuss what has happened. Melville adds another dimension to the irony of his story by reminding the reader that it was in fact fortunate that Captain Delano did not apprehend the truth any sooner than he did. Further, Don Benito comforts him saying that the best of men would have made the same mistake. He is, of course, precisely right, for, as we have seen, all of Delano's misjudgments were due to his benevolent disposition, the fond charity of his heart.

Contemporary as well as modern critics of this story have speculated about Melville's reasons for appending the deposition to the end of the story. Some have felt that he actually projected a longer work, but wanted some guarantee of a publisher before he went ahead with his plans. It seems equally valid, however, to assume that Melville was making yet another comparison, like the one to be found implicitly in Pierre, between what takes effect in "the warm halls of the heart" and the oaths and holy writ proofs demanded by the dull head in "the cold courts of justice".

The above explication of "Benito Cereno" concludes the study of the general influence of the science of evidence upon Melville's resources for exploring the epistemology of ambiguity. In the

next chapter, "Murder, Malice, and Moby-Dick," the particular problem of "psychological fact" will be examined in a context of legal proofs and some contemporary murder trials in which Melville's father-in-law, Judge Shaw, became publicly, sensationally, (one might stop just short of notoriously) involved.

The influence of legal studies upon Melville's work is not limited to his use of the rules of evidence to create ambiguities in Moby-Dick or to dramatize judicial action upon credibility in Pierre and "The Raven." It is also likely that some of his interest in the "psychological" is a result of his "psychological" studies, especially in the area of evidence of undoubted facts from the jurist's perspective, with this problem in homicide cases. As Judge Shaw, who Melville wrote "crimes . . . consist not merely in an act done, but in the motive secret of the heart, which can only be known to the Searcher of all hearts. . . ." Shaw believed that such motives might be inferred safely from a man's conduct and appearance, but Melville appears to have disagreed. The son-in-law of the judge wrote stories in which appearance, and external demonstrations on the whole, may be said to be the springs of conscience.

Between 1847 and 1850 several important and well-known cases

¹ George Burd, *Report of the Proceedings of the Court of Sessions, London*; Charles C. Little and James Brown, *1847-48, 1848-49, 1849-50*.

Chapter IV

Murder, Malice, and Moby-Dick

The influence of legal science upon the craft of Melville's prose is not limited to his use of the rules of evidence to contrive ambiguities in Moby-Dick or to dramatize devilish tricks upon credulity in Pierre and "Benito Cereno". It is also likely that some of his interest in the difficulty of establishing a "psychological truth," specifically malice, from the evidence of undoubted deeds stems from the jurist's preoccupation with this problem in homicide cases. As Judge Lemuel Shaw himself wrote: "crimes. . . consist not merely in an act done, but in the motive secret of the heart, which can only be directly known to the Searcher of all hearts. . . ."¹ Shaw believed that such secret motives might be inferred safely from a man's conduct and external acts, but Melville appears to have disagreed. The son-in-law of the judge wrote stories in which appearances, and external manifestations on the whole, represented ambiguously at best the springs of conscience.

Between 1843 and 1855 several important and well-publicized

¹George Bemis, Report of the Case of John W. Webster (Boston: Charles C. Little and James Brown, 1850), pp. 466-67; cf. 462.

murder trial came before Chief Justice Shaw as he presided over the Supreme Judicial Court of Massachusetts. In a number of these cases, perhaps due to the sentimentality of the times, the issue most debated was whether the defendant had done the killing with malice aforethought. Some members of the legal profession, including Melville's acquaintance, Richard Henry Dana, Jr., contended that by no trick of logic could one deduce a moral or psychological truth (malice) from a physical truth (the fact of the deed itself). In the most notorious murder case to come before the Shaw Court, the Webster-Parkman trial of 1850, the entire reliability of circumstantial evidence was brought into doubt.

Melville raised the question of whether malice lay behind acts of homicide and violence in Mardi, Moby-Dick, and Billy Budd. In Pierre and "Benito Cereno" he dramatized the problems of trying to deduce moral truths from physical facts. If Melville's interest in these problems is examined in the light of contemporary homicide cases, it becomes increasingly evident that the "philosophical novelist" focused upon many of the same issues debated in his day by jurists.

In this chapter, therefore, four capital cases, antiques of legal history, are brought down off the shelf and dusted off for study as possible sources and influences upon Melville's work. The first of these is the case of Abner Rogers (1843), which raised a question about the relationship between monomania and criminal

responsibility. The case is important to Melville scholarship because it suggests a source for concepts of insanity in Moby-Dick, Bartleby, and Billy Budd. Second is the Peter York case (1844), which introduced into American courts the epistemological problem involved in trying to deduce malice from appearances. Third, the Hawkins case (1855) is mentioned briefly as an epilogue on the ultimate disposition of the issue by the Massachusetts Supreme Judicial Court. Finally, the details, issues, and chronology of the infamous Webster-Parkman case (1849-1850) are set against the corresponding aspects of Moby-Dick.

The first of these murder trials to rouse public interest was that of the lunatic Abner Rogers.² Rogers was an inmate of the Massachusetts state prison when he killed the warden in full sight of a half a dozen men, slitting his throat from ear to ear with a curved knife used for leather work. Rogers was adjudged a monomaniac in a jury trial before Judge Shaw, acquitted of the crime, and remanded to an asylum where he committed suicide a short time later. Shortly after the trial, public opinion ran against the "leniency" of the verdict. To quiet the outcry, counsel for defense, George Bemis, collaborated with Judge Shaw in producing a careful account of the trial in explanation and justification of its outcome. The book was Report of the Trial of Abner Rogers

²Commonwealth v. Rogers, 7 Metc. 500 (1844).

... (1844).

In the Rogers case, the question before the court was not whether the defendant had committed the deed, but whether he did so with malice aforethought; for a homicide, to nineteenth century jurists was not a murder unless it was done with malice. In those days, however, the English Common Law, then in force in America, directed the court to presume malice in the absence of any evidence to the contrary, if an intentional homicide were proved. At this point it may be noticed that this way of thinking about murder bears significant resemblance to the question of guilt or innocence debated in Mardi about Taji's role in the death of Aleema. The question became one of the mainsprings of the plot. As we shall see, however, the details of the homicide in Mardi correspond more clearly to those of the York case than they do to those of Rogers'.

In defending Rogers, Bemis did not dispute the right of the court to presume malice. Instead, his strategy was to try to rebut the presumption by offering proof of insanity. He contended that Rogers was what was known in those days as a paranoid monomaniac. Rogers imagined that evil forces were at work against him; he thought the warden was trying to kill him; and he felt justified, therefore, in taking the warden's life. Bemis' case was hampered because Rogers behavior prior to the murder was such that to untrained eyes he had not appeared insane.

It is likely that Melville took notice of the Rogers case, not

only because he had known Shaw all his life and might naturally be expected to pay some attention to a sensational event in Shaw's career, but also because the Rogers case is a landmark in American jurisprudence, one which would have figured in the conversation of lawyers who filled Melville's social life. The case established a controversial theory of insanity in American precedents because Judge Shaw permitted Bemis to introduce theories of psychology which were not yet accepted in other courts.

According to the theory of "partial insanity" generally received as correct by British and American courts in 1843, a man could be normal in every respect yet have delusions about one particular subject. These monomaniacs appeared normal to any but trained eyes, until an outbreak of violent or bizarre behavior occurred. The mental aberration of a monomaniac appeared to be "partial"; i.e., with reference to one subject only. The courts therefore held that such persons were in general able to distinguish right from wrong. Jurists reasoned that the evidence of the monomaniac's daily life argued that he did in fact make judgments many times each day founded upon that ability.

In a triumph of logic the courts had concluded that delusions alone about one particular subject could not exempt one from moral responsibility. The McNaughten case, famous in early nineteenth century British jurisprudence, had elaborated this notion into a curious rule, as follows: the delusions a man suffered would not

excuse him from criminal responsibility for his acts unless the delusion offered the same legal excuse for an act that real circumstances would offer. The concept is best made clear by example. If a man suffered the delusion that another were making an attempt upon his life, he would be excused for a homicide, because if the other were really trying to kill him, he would be legally justified in retaliating. If, on the other hand, he hallucinated that another were slandering him, he would not be excused, since it is not legally justifiable to kill another for taunts and slander alone were they in fact occurring. Using this guideline the courts conceded the delusions of a monomaniac, but still regarded him as a morally responsible agent.

The new theories which Bemis brought into the Rogers trial claimed that monomaniacs were not "partially insane," but totally insane, and hence the term was grossly misleading. The evidence of the most advanced psychology known in Bemis' day suggested that paranoid delusions, even if limited to one subject, are manifestations of a generally disordered personality. The patient's normal appearance is the result of the enormous effort he makes to conceal the disordered workings of his mind out of fear that he will be caught and punished or thwarted in his plans to defend himself. Sooner or later the illness, known then as monomania, causes the sufferer to focus upon one subject toward which behavior becomes uncontrollable.

In most cases monomaniacs become obsessed with a single idea. Expert witnesses at the Rogers trial insisted that patients suffering this kind of illness often cunningly conceal their disease, making every effort to appear normal in order to bend all means toward their one obsessive end.³ After a time they no longer worry so much about being caught and punished, as being detected and thwarted.

Melville dramatized this concept of monomania when he created crazy Ahab. The mad captain gained command of the Pequod by deceiving her owners into thinking he is sane. The idea emerges again in Bartleby when he portrayed the strange clerk initially as a good and dutiful employee. In Billy Budd Melville again toyed with the possibility that madness may be cloaked in respectability and propriety by casting doubt upon the sanity of Vere and Claggart.

In the Rogers case Bemis argued another important insight of modern psychology when he asked the court to consider that each individual experiences a different level of provocation to certain forbidden acts (Bemis, Rogers Report, pp. 158, 162, and 164-65). The law might pass standards of justifiable provocation for a healthy personality ("out of tenderness to human nature," as Judge Shaw expressed it), but such standards were useless in reference to

³George Bemis and George Tyler Bigelow, Report of the Trial of Abner Rogers, Jr. . . . (Boston: Charles C. Little and James Brown, 1844), p. 165.

a disordered personality in precarious balance. To Abner Rogers, who was convinced that the warden had a design upon his life, the slightest gesture or look could have suggested peril.

By these lights, Bemis contended, it was difficult to see how the court could hold a monomaniac a morally responsible agent. The fact of his delusions implied a totally disordered personality. It was not safe or reasonable to assume that such a person had the ability to distinguish right from wrong. Bemis asked the jury to accept the idea that a monomaniac has an impaired control over his will. Such a handicap would reduce his moral accountability as a voluntary agent. Finally, Bemis argued, legal standards of justifiable provocation could not apply to a morbid temperament which was prone to detect malicious agencies working against him where none in fact existed. Thus Ahab believed himself provoked to murderous vengeance by the white whale that took off his leg, though it remains a moot point whether the whale acted with malice.

The characteristics and moral implications of "monomania" which Bemis introduced in the Rogers case bear many resemblances to those generated by Melville when he created the mad Captain Ahab.

Rogers' symptoms were described by a series of witnesses produced by Bemis. Relatives testified he used to walk his chambers every night after everyone had gone to bed, sometimes walking the floor all night. The next day he would be dull or at other times

wild and pale, complaining of pains in his head.⁴ A psychiatrist, the eminent Dr. Isaac Ray, testified that this sleeplessness was one of the major symptoms of monomania (Bemis, Rogers Report, pp. 162-66). Cellmates complained that they lost sleep because of Rogers' restlessness, pacing in his cell and making wild outcries. Ahab's pacing all night is the cause of his quarrel with Stubb, who remarks that the old man is not in his berth three hours out of twenty four.⁴ Ahab walks the ship from "taffrail to mainmast" until the incessant noise brings Stubb from below (Moby-Dick, p. 112). Further on in the novel, Ishmael reports that the captain would suddenly burst from his cabin with staring eyes and a wild yell (Moby-Dick, p. 174).

In opening his charge to the jury in the Rogers case, Shaw gave the following description of monomania:

The conduct may be in many respects regular, the mind acute, and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion by which the mind is perverted. The most common of these is that of monomania, when the mind broods over one idea and cannot be reasoned out of it. (Bemis, Rogers Report, pp. 64-66)

Dr. Isaac Ray, controversial psychologist, testified that the delusions of the insane are frequently concealed (Bemis, Rogers Report, pp. 162-66). Bemis presented cases and anecdotes of monomaniacs

⁴Herman Melville, Moby-Dick: An Authoritative Text, ed. Harrison Hayford and Hershel Parker (New York: W. W. Norton and Company, Inc., 1967), p. 112.

who had convinced bench and bar of their total sanity until the prosecution was given the key to their particular madness (Bemis, Rogers Report, pp. 64-66). Ahab was able to convince the two hard-headed ship owners, Bildad and Peleg of his sanity and competency, when really, "Ahab in his hidden self raved on" (Moby-Dick, p. 161). Peleg does tell Ishmael, however, that he knows Ahab has been "desperate moody, and savage" since the whale took off his leg (Moby-Dick, p. 77). Bemis won a precedent in the Rogers case by establishing the fact that the delusions of a monomaniac were not only concealed, but overwhelming and will-destroying. Rogers was not a responsible moral agent, because he was "pushed by a will foreign to his own, and which he could not resist" (Bemis, Rogers Report, pp. 197, 165, and 205). Chief Justice Shaw, in Bemis' version of his charge to the jury, repeated the advice asking them to decide the following: "whether the prisoner in committing the homicide acted from irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of the mind directing it" (Bemis, Rogers Report, p. 278). Question as to Ahab's moral responsibility intrudes again and again upon the narrative of Moby-Dick. Melville tells the reader that Ahab no longer had control of his madness or his actions:

this Ahab that had gone to his hammock, was not the agent that so caused him to burst from it in horror

again. The latter was the eternal living principle or soul in him; and in sleep, being for the time dissociated from the characterizing mind, . . . it spontaneously sought escape from the scorching contiguity of the frantic thing, of which, for the time, it was no longer an integral. (Moby-Dick, p. 175)

Obviously Shaw's summary cited above is a trifle incomplete. It is somewhat absurd to conceive of an act as being merely of the body. Melville, suggestively referring to the possibility that Ahab is possessed, merely alludes to whatever intelligence is driving Ahab's body as "the frantic thing". Yet if the explanation is taken in its whole context, the "frantic thing" seems to be "the characterizing mind". In this way the idea of possession by an external agent is undercut by the notion that the thing is merely Ahab's diseased mind. In any case, Melville used the idea that the body was somehow acting in a way divorced from the morally culpable part of man, in Shaw's terminology, "the mind," and in Melville's, "the soul".

Melville's psychology of how a monomaniac operates is identical to that presented by Bemis at the Rogers trial. At one point the narrator of Moby-Dick explains:

Ahab in his hidden self raved on. Human madness is often a cunning and most feline thing. When you think it fled, it may still have become transfigured into some still subtler form. . . . Now in his heart Ahab had some glimpse of this, namely: all my means are sane, my motive and my object mad. Yet without power to kill, or change, or shun the fact; he likewise knew that to mankind he did long dissemble; in some sort did still. But that thing of his dissembling was only subject to his perceptibility, not to his will determinate. Nevertheless, so well did he succeed in that

dissembling, that when with ivory leg he stepped ashore at last, no Nantucketeer thought him otherwise than but naturally grieved, and that to the quick, with the terrible tragedy which had overtaken him. (Moby-Dick, p. 161)

Thus Melville uses Bemis' idea that whatever a monomaniac does which appears normal is done only to dissemble, that in reality, every thought, every action taken by an obsessed person is bent toward his one goal.

The Rogers case became a precedent in American law. It was cited by every subsequent prosecutor or defense counsel in cases dealing with a plea of insanity. In America it eventually superseded the M'Naughten rule, which treated people with paranoid delusions as though their will were not impaired nor their moral sense distorted. After the Rogers case many American courts dropped the notion of "partial insanity" on the grounds that it was misleading and untrue.

The evidence of Moby-Dick confirms the idea that Melville accepted, or at least was aware of, the concept of "monomania" as fashioned in the precedent-setting case of Abner Rogers. It is interesting to note that by these legal standards, Ahab was not responsible for whatever malice lay behind his persecution of the whale and the destruction of the Pequod. The issue adds weight to the possibility that Melville saw malice as a force in the universe independent of human responsibility for its existence.

Not accounted for by the Rogers case is the comment which

Melville makes about Ahab's madness. He wrote that it was "his torn body and gashed soul" bleeding into one another that had made him mad (Moby-Dick, p. 160). Melville recognized that the psyche may be traumatized and that the experience may allow one to transcend the realm of earthly values and orderings. Pip, Gabriel, and Elijah were crushed and crippled beings whose bodies became houses of divine wisdom. Melville concludes: "So man's insanity is heaven's sense; and wandering from all mortal reason, man comes at last to that celestial thought, which, to reason, is absurd and frantic; and weal or woe, feels then uncompromised, indifferent as his God" (Moby-Dick, p. 347). Ordinary earthly existence is a series of compromises and comfortable adjustments made by reasonableness. Absolute justice or absolute truth may wreak cataclysmic disasters of the magnitude one usually attributes to "an act of God," as the insurance companies call it. Insanity releases men from temporal contingency and its necessary concomitants of reasonableness and common sense. If one is carried down to wondrous depths like the little cabin boy,⁵ or delivered up to Demogorgon

⁵Boston Daily Transcript, November 19, 1850: on the front page is an article puffing Forbes' Journal of Psychological Medicine for October, 1850. The note discusses the pathology of insanity. Illustrating the argument is an anecdote of a shipwrecked emigrant in the straits of Dover who was traumatized into raving insanity by one night and one day in the water.

in a whale, one is brought face to face with the Absolute and is forever changed. It is not their insanity per se which makes Pip and Captain Ahab equals, but the fact that they have both passed over into a different state of being from that shared by most mortals, one for weal and the other for woe. Melville seems to be saying that Ahab's great injury and Pip's great fright were enough to destroy a part of their mortal being and to dissolve their allegiance to this earthly state of existence. Naturally then their moral sense was abrogated by an order of things alien to worldly ways, causing Ahab to set aside his duties as captain of the whaling vessel and Pip to disregard all further protocol in his behavior on board the ship.

Although the Rogers case offers a possible source for Melville's conception of Ahab's disease, it also raised questions about the relationship between the world of the "undoubted deed" to the inner world of the mind, between the world as a reasonable and prudent man sees it and the vision of reality available to a diseased or abnormal mentality. Bemis asked the court to assign a relative value to the term "fact" as meaning one thing to the normal mind and another thing to the abnormal mind.

The second controversial trial of interest to students of Melville's work is that of rough and tumble Peter York, indicted for the murder of another waterfront character in a scuffle over a woman. The stabbing occurred in full view of a crowd which had gathered to

watch. The trial would have resulted in another routine conviction had the defense counsel not been the young Richard Henry Dana, Jr., who had the zeal and audacity to challenge Shaw's interpretation of the law of implied malice. The jury had returned a verdict of guilty after listening to Judge Shaw's directions that in any case in which an intentional homicide is proved the court must presume malice if there is no evidence to the contrary. Dana argued that though many witnesses had seen York stab his opponent, none could know whether York actually had malice in his heart. Therefore, Dana asserted, Shaw had erred in directing the jury to presume malice if they felt that the homicide itself had been proved. The letter Dana sent Shaw advising him of his intention to appeal the case on these grounds is still in the Shaw papers at the Harvard College Library.

It would appear that Melville introduced a similar problem into Mardi (Taji stabbed the priest Aleema over the woman Yillah and then pondered his motives for the act, wondering whether he had committed murder.) The plot mechanism may have had its source in the York case, which had provided the first, and at the time, the only instance in which Dana had had a confrontation with Shaw. Biographical evidence would support such an idea in that the insertion of this drama into Melville's third novel occurred in 1848, shortly after he made Dana's acquaintance and at the same time became more intimate with his new father-in-law, Judge Shaw.

The Supreme Judicial Court, which sat as a court of last resort

as well as the original trial court, voted to reject Dana's appeal in the York case, one member, Justice Wilde, dissenting.⁶ Shaw wrote the majority opinion, citing twenty pages of authorities, until, as Leonard Levy remarks, "the roll call of names reads like a 'who's who' of English jurisprudence."⁷ Later on, when the American authority, Joel Parker, criticized Shaw's charge on malicious homicide in the Webster case of 1850, he acknowledged Shaw's doctrine to be in conformity with that found in English books generally received by authorities. Shaw had not erred in reporting the law to the jury. Parker pointed out, however, that the acceptance of the English authorities was more widespread at the time of the York trial than at the time of the Webster case six years later.⁸ The remark is indicative of, among other things, the volatile state of American law in the decade of the 1840's.

The doctrine that Shaw supported and expounded dealt with the proof of malice. In general usage, malice means ill-will, but in its legal sense it designates the mens rea, an intent to do an un-

⁶Commonwealth v. York, 9 Metc. 93 (1845)

⁷Leonard Levy, The Law of the Commonwealth and Chief Justice Shaw (Cambridge, Mass.: Harvard University Press, 1957), p. 22.

⁸Joel Parker, "The Law of Homicide," North American Review, 72 (1851), 178-204.

lawful act. Proving this state of mind was a problem, since no one is privy to the thoughts and feelings of another. The solution which Shaw and other orthodox jurists maintained was that malice could be deduced from the whole evidence. Shaw believed, however, that this deduction should remain incorporated into the law as a presumption whenever an intentional homicide was proved, and there was no excuse offered by the defense. More liberal thinkers wished to see the matter left in the hands of the jury. In that case malice would always have to be proved by the circumstantial evidence, and the burden of proof would fall upon the prosecution. In this way a defendant would remain innocent of murder until the state could convince the jury that his actions had been malicious.

Dana's audacity in the York case and Bemis' ingenuity in the Rogers case began the debate in the Shaw Court (in its time the most respected tribunal of criminal law in the nation) over the validity of deducing moral truth from appearances. The issue culminated in the Webster trial of 1850, in which the full bench unanimously maintained the ground they had defended in the York case. However, as a glance ahead to the Hawkins murder trial of 1855 reveals, the vindication of the position Shaw had taken in the York case was more dramatic than real.

By 1855 public and professional opinion had had an effect upon the court. In that year the Hawkins case came up for trial before Shaw, and in this instance he restricted presumption of malice to

cases in which nothing was known beyond proof of intentional homicide. This qualification had been made in the York and Webster cases, but then it seemed to mean that the rule applied only when there was no excuse shown for the crime (Levy, p. 226). In the Hawkins case, Shaw did not instruct the jury to presume malice, but to examine the evidence, and if they became satisfied beyond a reasonable doubt that the act was done with malice, to return a verdict of murder, otherwise to return a verdict of manslaughter. Furthermore, he explicitly stated that the murder charge must be proved and that the burden of proof was on the Commonwealth (Levy, p. 226). Although Levy does not seem to think so, the charge in the Hawkins case was a considerable retreat from the rule of the York case. In effect, Shaw quietly dropped the presumption of malice by the law and instructed the jury that it is they who must construe the malice "upon all the circumstance".

Often Melville left the question of malice open for his jury of readers to decide. At the conclusion of Mardi, Taji sails away and the reader still has no answer as to whether Aleema's death was murder of which he still stands accused, or justifiable homicide. Melville employed the same device subsequently in Moby-Dick. Generations of readers have failed to agree about whether the captain or the whale is the real villain of the story. Finally in Billy Budd the reader once more becomes involved in judging the case and determining whether the defendant deserves death or not.

In that final book, Vere adopts a position remarkably similar to that taken by Judge Shaw. Vere believes that the necessity for society and order takes priority over individual lives. At the heart of Shaw's insistence upon the presumption of malice in the law is the proposition that society cannot permit willful homicide regardless of the private intentions or motivations of the individual. In spite of dire provocation, in spite of what evil one might believe he perceives, retaliation must be channeled through the forms that society allows for redress. If society allows no way for the individual to relieve himself of oppression, he must sacrifice his desire to retaliate to the priorities of law and order, the foundation of civilization. Part of Shaw's definition of malice, as we shall see, emphasizes the presence of a heart which prompts a man to act "regardless of social duty".

Shaw also believed that the sense of social responsibility requisite to the disinterested disposition of cases was best preserved in the body of the law and in the hands of the judge. To be discussed in a later chapter, this concept of the judicial function plays a large role in determining the character of Captain Vere in Billy Budd.

The controversy over proving malice from physical evidence came to a climax in the Webster trial of 1850. In this case the victim of the homicide was George Parkman, one of Boston's most prominent citizens. The defendant was Harvard professor John White Webster,

who pleaded innocent. Acting prosecutor was George Bemis. This case especially merits the attention of Melville scholars because it took place before Judge Shaw during the composition of Moby-Dick. While his father-in-law sat in Boston, embattled by the furor created by the Webster case, Melville was residing in the nearby Berkshires, working on his whaling story and preparing to buy Arrowhead. The Melville and the Shaws visited one another several times during this period. As the following narration of the case unfolds, it may become apparent that there are marked similarities between the murder victim, Parkman, and mad Ahab and between Webster, the accused, and the White Whale. The Webster trial contains several elements of plot and persona to be found in Moby-Dick.

On November 30, 1849, just 50 days after Melville left for Europe, gruesome remains were found in a vault beneath a privy in the Harvard Medical College. Within hours Dr. John White Webster, Harvard professor, was arrested for the murder of his colleague and creditor George E. Parkman. Thus began the Webster-Parkman case, still considered to be the most sensational trial of the 19th century.

The Webster case caused an unprecedented furor because of the hideous dismemberment and because of the dozens of Boston's most prominent citizens it involved. The remains were found scattered about Webster's laboratory. A pelvis and two pieces of leg were found in his privy and the thorax with the other thigh jammed into

its cavity was discovered under a quantity of tan in a tea chest. Charred remains of a skull were found in the laboratory furnace, and it looked as though the profess had been trying to dispose of the body by burning. The hands, the feet, and the lower portion of the left leg were never found at all. It seemed that Parkman, like Ahab, had suffered a bodily dismemberment.

When these pieces were collected, several august members of the Harvard Medical School, later "expert witnesses" at the trial, assembled to inspect them. Among these grave doctors was the Dean of Harvard Medical College and George E. Parkman Professor of Anatomy, Dr. Oliver Wendell Holmes. Twenty-five of the Harvard faculty and alumni were called as witnesses, including President Jared Sparks. In addition, two counsel for defense, two prosecutors, and all four judges, including Chief Justice Shaw, were Harvard graduates. The roll call of the other witnesses reads like the Boston social register.

Webster's arrest immobilized the social world, caused some businesses to close down, and monopolized the attention of the public. Harvard's unofficial historian, librarian John Langdon Sibley, reported in his diary that the affair had checked all hilarity and parties just beginning in Cambridge and Boston for the winter and that people met and talked with the understanding that the subject of the murder should not be introduced. Harvard suspended classes in the week following the grisly discovery, and the militia was mobilized to fend

off attacks made on the Medical School by an excited rabble.⁹

The press responded with a deluge of coverage. At least eleven Boston newspapers carried the story; within a short time the major New York and Philadelphia papers had correspondents on the scene. Freeman's Journal and the Police Gazette reported the story nationally. Rapidly the news spread to all sections of the country and to capitals overseas. Newspapers in London, Paris, and Berlin carried the story in full. Before long, according to the gossip Sibley, every man, woman, and child in the United States and western Europe was acquainted with the "Boston Tragedy".

In his diary, Sibley lamented the attention the murder received, which in his opinion amounted almost to a public monomania. The sensationalist press pandered to such morbid interest, capturing and holding the public's attention by dramatic, well-timed installments appearing throughout the year even after Webster had been hanged. Like the celebrated case of the cigar store girl, Mary Rogers (later Poe's Marie Roget),¹⁰ the Webster trial was given an exaggerated amount of coverage even by respectable journals, far beyond the norm for such cases.

Malice had been found under the respectable facade of a Harvard

⁹Robert Sullivan, The Disappearance of Dr. Parkman (Boston: Little, Brown, and Co., 1971), pp. 38 and 214.

¹⁰John Evangelist Walsh, Poe the Detective; the Curious Circumstances Behind the Mystery of Marie Roget (New Brunswick: Rutgers University Press, 1968).

professor, and during the uproar the unsavory dunning practiced by Parkman among the poor had been aired. That a Parkman should deal with one of his own in this fashion and that the unassuming Dr. Webster should act like a common "hoolighan" over his debts, such doings were a greater scandal to Boston society than all the noise, dirt, and fuss of a thousand Irish immigrants. The press of course did not miss the chance to make comments about the evil that might lurk behind the doors of the first institution of learning in the land. The murder ripped the masks off two of society's members and the exposure proved by far, it seemed, to be a more unforgivable act than the homicide itself.

Although scholars have declined to question the circumstance, it seems odd that Evert Duyckinck should have resurrected Hawthorne's book, Mosses from an Old Manse, for review in the summer of 1850, seven full years after its first publication. Some have dismissed Duynckinck's giving the book to Melville in July for a review as being a gesture somehow connected with the prospect of his meeting Hawthorne in the Berkshires. However that may be, one is also justified in seeing Duyckinck as a magazine editor anxious to capitalize upon the public furor over the Boston Tragedy that prevailed throughout 1850. The clamor reached a climax in July when Webster's luridly detailed "confession" of the atrocity was published in newspapers all over the nation. It is not unlikely that the embarrassment suffered by Boston society was at least partly responsible for

Melville's focusing upon "Young Goodman Brown". The story, one recalls, deals with the "heart of darkness" that may underlie even the most respectable facades, particularly that of Puritan Boston.

Several comparisons between Dr. George Parkman and Ahab are possible. Before his disappearance the family worried about Parkman's sanity. Dr. Edward Jarvis testified before the Executive Committee on Pardons reviewing Webster's conviction that he had examined Parkman shortly before his disappearance because the family believed he might be having a relapse of a previous mental condition. Enough credence was placed in "sudden mental aberration" to include it in 26,000 reward notices distributed (Sullivan, p. 8).

At the trial, which began on March 19, Parkman's brother-in-law, Robert G. Shaw, testified that Parkman had insisted upon personally prosecuting his debt on Webster. According to Robert Shaw, Parkman, like Ahab, pursued his victim with an inexplicable vehemence, amounting almost to obsession. This pursuit was corroborated by other witnesses. The defense made what it could of this circumstance, addressing the following remarks to the jury:

. . . you know that under that imputation of injustice and dishonesty, he pursued him with an unchanging resolution. . . . So early as the first conversation with his brother-in-law, Mr. Robert Gould Shaw, . . . the feelings of Dr. Parkman were strongly excited against the prisoner . . . from that hour to the last in which he was known to be alive, that excitement never subsided, but continued rather to increase. In pursuit of the one object, of which he never permitted himself to lose sight, he had several interviews. . . . he would not be deterred from

persisting in further efforts. He had said emphatically to Mr. Shaw, that he would have his money. Mr. Shaw kindly essayed to calm his mind, and induce him to give over his purpose. . . . he could not forbear the pursuit. . . . He would not resort to the law, nor seek the aid which that might afford him. . . . He seems to have believed, that he could adopt some mode of proceeding for himself. . . . Accordingly, his pursuit was constant and unremitted, his purpose never changed and inflexible,---his manner never calm or tranquil. (Bemis, Webster Report, pp. 316-17)

After Webster's execution, popular sentiment swung to a wholehearted sympathy with the underdog; and the Boston Daily Times printed this unflattering account of Parkman:

The Tiger Creditor Parkman, was an old man burdened with his riches, hunting down his victim, Webster, knowing Webster would not dare resist; a Shylock seeking his pound of flesh; Parkman's activities were more revolting than Dr. Webster's, hunting Webster at his place of business, at his place of repose, not only insulting Webster but his wife and children, threatening him with poverty and a blasted character, ruin for his family, and much more with the utmost ferocity of manner.¹¹

The public divided between believing Webster innocent or believing him guilty but not proven so (Sullivan, p. 166). Opinion was unanimous, however, in believing that he had been twice mercilessly pursued, first by the "Tiger Creditor" and second by a Parkman resurrected in the power and influence of his family and in all of

¹¹Sullivan, p. 167; quoted from the Boston Daily Times, August 31, 1850.

Boston society. There were many who said that the Parkmans had enlisted the ship of state in their private quest for vengeance. Melville's persecuted whale was not the only "victim" manufactured in 1850 whose motives remain ambiguous to speculation. In the public mind there existed a "bad Webster," chiefly before the trial, and a "good Webster," after the conviction. A pamphlet, garishly titled The Boston Tragedy! An expose of the evidence in the case of the Parkman Murder!, was published just weeks after his arrest. It was written before the trial began and does anything but report the true facts. The pamphlet is highly prejudiced against Webster, convicting him of the crime and moralizing upon his unbounded wickedness in the most sentimental fashion of the day. It contains a portrait of Webster which shows him so sinister that it has been dubbed "the vampire portrait".¹² In the most widely circulated picture published after the trial, Webster appears in baby-faced benevolence.¹³ This latter illustration was an etching done for the Boston Herald, later borrowed by other publications up and down the East coast and finally selected for the Bemis Report.

¹² anonymous, The Boston Tragedy! An expose of the evidence in the case of the Parkman Murder!; published in Boston before the trial, this pamphlet is listed in Thomas W. McDade, The Annals of Murder: A Bibliography of Books and Pamphlets on American Murders from Colonial Times to 1900 (Norman: University of Oklahoma Press, 1961); see also Sullivan, p. 44 for a reproduction of the "vampire portrait".

¹³ Sullivan, frontispiece; reproduced from John A. French, The Trial of John W. Webster (Boston: Boston Herald Steam Press, 1850).

Even today debate continues over who was the real villain of the case, Parkman, the murder victim, or Webster, the convicted murderer. Two books have been published within the last several years, one supporting Webster's claim of innocence, the other at least raising questions about his guilt.¹⁴ The problem remains the same today as in 1850. Was Webster a monstrous, malicious murderer? Or was he simply guilty of manslaughter which occurred when he was cornered by the monomaniac Parkman? It is probable that the question will never be settled and that criminal lawyers and historians will go on debating Webster's character endlessly, just as Melville scholars seem disposed to debate without convincing resolution the goodness or evil of the whale.

The Webster case came to its climax in July and August of 1850 just at the time when Melville began his serious revisions of Moby-Dick. Studies of these revisions show that they involve a monomaniac hunt and the question of malice or innocence in the object of the mad pursuit.¹⁵ It would seem that Moby-Dick became a looking glass filled with images of the grimly staged events in Boston.

¹⁴Besides Sullivan's The Disappearance of Dr. Parkman (1971) there is also Helen Thompson's Murder at Harvard (Boston: Houghton Mifflin, c1971).

¹⁵Howard Vincent, The Trying-Out of Moby-Dick (1949; Carbondale: Southern Illinois University Press, 1965), pp. 25, 36, and 40-49; see also Leon Howard, "The Composition of Moby-Dick," Moby-Dick, pp. 709-27.

It strikes one repeatedly in browsing through accounts of the Webster trial that the descriptions of the murdered Parkman read like notes for a portrait of Ahab. Fortunately, to obtain this description of the Boston murder victim it is not necessary to follow the steps of the officers from the coroner's office, who had to grope into privies and chest filled with tan to find the pieces, nor as Melville suggests in Moby-Dick is it necessary to "grope down into the bottom of the sea after them, to have one's hands down among the unspeakable foundations, ribs and very pelvis of the world" (Moby-Dick, p. 118). Handbill accounts, trial testimony, and newspaper reports gathered by a modern researcher are sufficient.

At the time of his disappearance Parkman was about sixty years old, tall and slim with well-muscled legs. His hair was gray, and he had a noticable scar under his chin (Sullivan, p. 8). Ahab is frequently referred to as an old man, and he reveals to Starbuck in "The Symphony" that he is in fact 58 years old (Moby-Dick, p. 443). For the character of Ahab, Melville expanded the scar, which he says was "threading its way out from among his grey hairs" (Moby-Dick, p. 110). Later, when Ahab has an encounter with the ship's carpenter, Melville describes Ahab's legs as "the heron's legs! long and slim, sure enough!" (Moby-Dick, p. 392). The peculiar structure of Parkman's body, in particular his long, slim, well-muscled legs, was mentioned frequently by his acquaintances in their attempt to identify the remains. Parkman was known for his rapid, nervous way of walking. Illustrating the New York Globe's Trial of Professor John W. Webster

and Bemis' Report is a sketch of Dr. Parkman which makes him look remarkably like a heron in the angle of the body to the long slender legs, the tail of his frock coat hanging down over the hips.¹⁶ Finally, Parkman's body had been dismembered and the lower left leg was missing. Melville refers to Ahab's loss of his left leg as "his bodily dismemberment" (Moby-Dick, p. 160).

Features of Parkman's personality are identical to those of Ahab. Both were irritable and stubborn, given to outbursts of temper when crossed, but capable of tenderness toward the weak and the infirm. Parkman was known as a ruthless creditor, capable of high dudgeon and relentless pursuit. At the same time he had a reputation for going out in the middle of the night to relieve the sufferings of his pauper tenants.¹⁷ Ahab too is described as having his humanities, and he shows kindness for poor Pip.

Besides this gross similarity in physical details and in some aspects of personality between Parkman and Ahab, Melville created another, macabre resemblance. The suggestion that occurs several times throughout Moby-Dick that Ahab is kin to other traditional

¹⁶Sullivan, p. 35; reproduced from New York Globe pamphlet, The Trial of Professor John W. Webster (New York: Stringer and Townsend, 1850).

¹⁷Richard Henry Dana, Jr., Two Years Before the Mast, 2nd ed. (Boston: Fields, Osgood, & Co., 1869), p. 441.

species of undead. While these hints strengthen the idea that he is possessed by an evil spirit, they also support the notion that Ahab was resurrected for the final pursuit of his victim. His first spoken words reflect the idea:

he seemed so much to live in the open air, that truly speaking, his visits were more to the cabin than from the cabin to the planks. "It feels like going down into one's tomb," he would mutter to himself, "---for an old captain like me to be descending this narrow scuttle, to go to my grave-dug berth." (Moby-Dick, p. 112)

Later, Melville speaks of Ahab's mental agony as "some guilty mortal miseries which shall fertiley beget to themselves an eternally progressive progeny of griefs beyond the grave" (Moby-Dick, p. 385). In this same passage he discloses Ahab's accident on shore in which he was beaten and left senseless by ruffians (Moby-Dick, p. 385). (Defense had theorized that this had been Parkman's fate.) Afterwards nursing an injury to his crippled side, Ahab "sought speechless refuge among the marble senate of the dead" (Moby-Dick, p. 386). The note is struck again by the carpenter working on a new leg for the captain: "let's finish it before the resurrection fellow comes a-calling with his horn for all legs true or false. . ." (Moby-Dick, p. 392). The words "resurrection fellow" may allude to the archangel Gabriel, but they were also applied to those who robbed graves to supply the medical schools with bodies. The star witness of the Webster trial, janitor Ephraim Littlefield, was a known resurrectionist. Defense even hinted to the jury that Littlefield's activities

could have explained the presence of the corpse in Webster's laboratory. Finally, in the midst of a tempest Starbuck finds Ahab sleeping in his chair: "Terrible old man! thought Starbuck with a shudder, sleeping in this gale, still thou steadfastly eyest thy purpose" (Moby-Dick, p. 202). This description characterizes Ahab as a spectre. There were those who said that Parkman was a spectre, resurrected in family and friends, renewing his unrelenting pursuit. Twice more images from the Parkman case cross the pages of Moby-Dick, as Ahab exclaims, "By heavens! I'll get a crucible, and into it, and dissolve myself down into one small compendious vertebra. So" (Moby-Dick, p. 392). Starbuck echoes the grim thought as he muses to himself:

I have sat before the dense coal fire and watched it all aglow, full of its tormented, flaming life; and I have seen it wane at last, down, down, to dumbest dust. Old man of oceans! of all this fiery life of thine, what will at length remain but one little heap of ashes! (Moby-Dick, p. 412)

The attempt to dispose of Parkman's body by chemical dissolution or by burning makes up nearly one-fifth of the testimony in the Bemis Report. One witness, another medical researcher, admitted to disposing of cadavers he had worked on by destroying them in his own living room fireplace, before which he would sit and tend the merrily blazing fire until the neighbors complained about the stench it created.

Both Parkman and Ahab had a certain kind of power. As head of his crew, Ahab, says Melville, was like a Mesopotamian despot, head of a large family committed to finishing his quest even though he were to die. "'Tis Ahab," cries the mad captain, "---his body's part; but Ahab's soul's a centipede, that moves upon a hundred legs" (Moby-Dick, p. 459). Though blasted by his efforts to harpoon the white whale, Ahab will not give up. He instructs Starbuck to prop him up so that he can continue the struggle. Even though the individual was down, the institution he had usurped for his purposes can function on.

The Parkmans succeeded in enlisting the "ship of state" for their private vengeance (or so their enemies claimed). In addition, they were able to add a reward out of their own pocket and to pay for the services of a special prosecuting attorney, George Bemis, known as the best criminal lawyer in Boston. It was considered highly irregular for Attorney General John Clifford (the man who supplied Melville with the "Agatha" story) to permit Bemis to prosecute the case for him. George Parkman, Jr. paid \$1,150 for these services, an arrangement which Bemis himself acknowledged to be a questionable deal (Sullivan, p. 59).

Ahab takes similar precautions in outfitting himself with a specially prepared boat and privately paid crew so he can personally join in the hunt and not be thwarted by any of his regular crew who might have the scruples or the cowardice to hang back from the unholy

chase. Melville's discussion of the matter suggests its impropriety. And what a boat's crew! In no less than five places they are referred to as Ahab's "tiger-yellow" crew (Moby-Dick, p. 190), recalling Parkman's reputation as the "Tiger Creditor". Elsewhere Melville remarks that human madness is a "most cunning and feline thing" (Moby-Dick, p. 161).

In the eyes of many, the Parkmans were guilty of a worse crime than Webster, who may have been stung into taking manly retaliation. This characterization of Webster in the popular press as the valiant underdog must have struck a responsive note in the author of White-Jacket. In that novel Melville had opined that a passionate noble spirit had no business being in this man-of-war world. The image of the relentless pursuer, irrationally provoked against some relatively inoffending character who is his inferior in station occurs at least three times in Melville's work after the Webster affair. It is in the major plot of Ahab pursuing the whale, in the minor one of Radney hounding Steerkilt, and finally in Claggart's harrassing of Billy Budd. Two of these instances are in Moby-Dick, the book which was in process in 1850 while the Webster case was being tried before Melville's father-in-law in nearby Boston. Unquestionably it must have piqued Melville's rebellious imagination to see Webster's plight against such an overmatch.

The story of Radney and Steerkilt is the most explicit statement of the case. This inserted story culminates in a scene in which the

mate insults the sailor and pursues him relentlessly around the deck, shaking a heavy hammer in his face. Parkman had allegedly insulted Webster repeatedly and in the fatal scene, according to a "confession" Webster published in July prior to execution, the rich man had cornered the professor in his laboratory, demanding his money be paid instantly, threatening Webster and shaking his fist in his face. This scene in the Webster affair supposedly terminated with the meek professor losing his temper at last and striking Parkman a blow which proved fatal. The basic story in all three instances (Ahab's pursuit of the whale, Radney and Steerkilt's confrontation, and the Webster-Parkman case) is the same: an initially unoffending creature is provoked to violence by the pursuit of one much his superior in station. The underdog wins the confrontation, but is then judged a criminal in the eyes of the world.

Although Melville was in Europe during 1849-50, he must have learned about the Webster trial just as well as any other "obscure man in every obscure part". It is unwarranted to assume from the silence of all his papers and letters on the subject that it could not have interested him. While he was in London, he attended the execution of England's most famous murderers, Mr. and Mrs. Manning, on November 13, only two weeks before the grisly discoveries in Boston. He sent his father-in-law a broadside of the hanging, depicting the miscreant couple on the scaffold and containing a ballad

about the "wretched guilty Mannings," no doubt feeling Shaw would have a professional interest.¹⁸ Melville kept a correspondence with Shaw while he was abroad, separate from his letters to Lizzie and Allan. In London, he would have received the news about the Parkman murder three weeks late. The London Times carried the story on December 23. It was not the issue that Melville notes sending Shaw on December 14 (Leyda, I, 347), but a copy of the Times article is in the file of clippings on the Webster trial in the Shaw collection of the Massachusetts Historical Society. Melville may have carried the paper with him when he sailed on Christmas Day.

When Melville got back on February 1, Webster's trial was only a month and a half away. The indictment had been returned January 18, and the case was to be tried when the court convened in March. A few days after Melville's return, his young brother-in-law, Sam Shaw, then a freshman at Harvard, came to visit for a few days, returning February 10 with gifts for the Shaw's, Melville's remembrances from abroad. The collegian must have been a treasure house of information about a subject so near and dear to his alma mater and his father's position. In the Shaw papers at the Harvard College Library there is a student pass for Sam Shaw to the Webster trial itself.

Out of mere wish for domestic felicity Melville would have been

¹⁸Jay Leyda, The Melville Log: A Documentary Life of Herman Melville, 1819-1891 (New York: Harcourt, Brace, 1951), I, 330-31.

cautious not to commit himself to any statements about the case, especially since he had become more and more aware throughout the early part of 1850 that his family needed new living quarters. In September, only days after Webster's execution, Melville had to obtain a second loan from Shaw on Elizabeth's inheritance, this time for \$3,000. The money was used for the purchase of their home in the Berkshires. It seems likely that out of common prudence and forethought Melville would have avoided involving himself or his opinions in the touchy situation which developed over Webster's conviction.

Melville's position as the Chief Justice's son-in-law would explain too why there was no discussion, as Leon Howard remarks,¹⁹ at the August picnic in the Berkshires even though the execution was only days away. Oliver Wendell Holmes, one of the guests at that picnic had been a witness for the prosecution. The "Autocrat" could have wished for no casual review of the trial or his role in it. The introduction of the subject could only have been in bad taste.

Two articles in the Literary World provide the only record of opinion about the affair within the Duyckinck group. In the April 20th edition there appeared an amusing front page article, "The

¹⁹Leon Howard, Herman Melville: A Biography (Berkeley and Los Angeles: University of California Press, 1967), p. 156.

Young Attorney Who Could Have Saved Webster," signed "H". The piece undoubtedly satirizes public obsession with the case during which everybody, but especially amateurs and sophomore law students, had an opinion. The following is taken from the World article:

O. G. (warming into talkativeness with the ale). No use, youngster. There's nothing like standing by Magna Charta and the Baronial Bill of Rights in a murder case, and hanging the man who can't give an account of himself under suspicious circumstances. It was a duty of the subject always to be ready with an account of himself to his sovereign.

Y. A. (rising to his feet). What monstrous doctrine. Miserable subterfuge of defunct feudalism. Even Beccaria---

O. G. (excited). Becky Rea was a novel reading housemaid. I remember her in the Spectator. I say again Webster ought to be hung under Magna Charta. Why he couldn't account for the notes! (triumphantly)

Y. A. (rolling up the old copy of the Times for a gesture wand). He paid 'em. You've got to take the whole of the admission, Starkie says so, and its good law even with Judge Paine. Webster says he came into the room---gave up the notes---received his money---and went out. Look at the injustice of the government and the ignorance of the Judge.

O. G. Pshaw!²⁰

It would appear that the Duyckinck group had its doubts and ambivalent feelings about the way in which the Webster trial had been conducted, but preferred to carry the matter no further than good

²⁰ anonymous, "The Young Attorney Who Could Have Saved Webster," The Literary World, 6 (1850), 341-42.

humor or polite speculation would allow.

On July 13, just after Webster's confession was published, the Literary World ran a ponderously moral editorial expressing relief that the court's decision had been vindicated.²¹ This front page article concluded with a panegyric on the wisdom of Judge Shaw's court in trusting to the time-tested jurisprudence to deduce the truth of the matter. Unlike the first, humorous sketch quoted above, the later article probably came from conservative lawyers among Duyckinck's friends, his old tutor, John Anthon, for example.

As in the Rogers case several years earlier, post-trial qualms induced George Bemis to get out a book presenting his version of the story. Once again he had the collaboration of Judge Shaw and others who had participated in the trial. Shaw revised his charge to the jury for Bemis' Report. He started on that task sometime in late June or early July. The Evening Transcript announced the forthcoming publication of the Report for July 9. Considerable delay was to develop before the book finally appeared on November 28. Bemis sheds light on the problems of revision in his diary entry for November 3, 1850, in which he blames "the omissions of my associates" and the Chief Justice's absence from town as the

²¹ anonymous, "The Webster Confession," The Literary World, 7 (1850), 25-26.

major hindrance to completion.²² Shaw was absent from town in mid-September, visiting the Melville's and holding a short term of court in Lenox, residence of Nathaniel Hawthorne, a mere carriage ride away from Arrowhead. The Chief Justice may have had with him the proofs, if not for the entire Report, for at least his own portion, the charge to the jury. In any case Bemis' book was out in time for Lizzie and Malcolm's regular Thanksgiving visit, and for the Christmas visit which may have been made by Melville himself.²³

A comparison of texts from Stone's "phonographic" report, from newspaper verbatim accounts of the trial, and from Bemis' Report shows the last of these to be unique in containing passages and phrases which are echoed in Moby-Dick. The same heavy, melodramatic style also characterizes Bemis' earlier work on the Rogers trial. The following are examples of the kind of material in the Report

²²Sullivan, p. 174; quotes from George Bemis' Diary, which is among the Shaw Papers in the Massachusetts Historical Society Library.

²³Howard P. Vincent, The Trying-Out of Moby-Dick (1949; rptd Carbondale: Southern Illinois University Press, 1965), p. 23n; and Leyda, I, 402: "Dec. 30, 1850---Someone in the augmented Shaw household does some reading on M's current subject; charged on Shaw's membership at the Boston Athenaeum: An Account of the Arctic Regions, with a History and Description of the Northern Whale Fishery by William Scoresby." In addition, Howard Vincent (Trying-Out, p. 23n) remarks that Melville probably made a Christmas visit to the Shaws'.

which Melville might have found particularly suggestive. The first is Bemis' version of a speech by one of the defense counsel in the Webster trial,

There is a mystery, beyond which you cannot solve. . . . they may be allowed to belong to that great class of the inscrutable facts of human life, which baffle the power of human reason, and defy the most intense efforts of human investigation. (Bemis, Webster Report, pp. 290-91)

Further on, defense counsel once more speaks of a "truth verified by all individual experience. . . . that truth is stranger than fiction. The imagination cannot keep pace with the actual events of life."

He continues,

There are mysteries in the order of Providence, in the circumstances of our condition, and in the ordinary course of our lives, which no intelligence we possess can adequately explain, they lie deeper down in the depths of our being than human reason can fathom,--- where its profoundest exertions can never sound. (Bemis, Webster Report, p. 291)

Elsewhere, Bemis represents the defense attorney as speaking of the "thick darkness which often shrouds the ways of men" (Bemis, Webster Report, p. 306), and the "darkness which cannot be penetrated and mysteries which cannot be explained" (Bemis, Webster Report, p. 343). That Melville dealt with ideas identical to these in Moby-Dick is plain to anyone who has read the book.

There can be no doubt that the Webster-Parkman affair is more than merely reflected in the pages of Moby-Dick. The controversy

over the trial flamed highest during the summer of 1850, a period already agreed upon by scholars as being critical in the author's decision to transform the simple whaling novel into a book quite different from the one he started out to write. As a result, more than just plot and characters were affected by the furor of debate following the verdict in the Boston Tragedy. It is entirely possible that although he was silenced by his position as the Chief Justice's son-in-law, Melville was nevertheless able to incorporate controversy from the passing scene (an intrusion which had its precedent in Mardi), into his whaling novel, letting it explode into a "tragic drama of Aeschylean proportions."

X As critics Howard Vincent and Leon Howard agree, in late summer or early fall 1850 Melville introduced monomaniac Ahab, who in his cracked way had become obsessed with the malice of the whale. Howard singles out "The Quarter-Deck" and "Moby-Dick" as the two chapters the author added in beginning his revisions after his friends left Pittsfield. In these two chapters Melville describes how Ahab's feud became that of the crew also and how rumor and superstition had transformed the ordinary perils of the fishery into popular terror at the "unexampled, intelligent malignity" (Moby-Dick, p. 159) of the white whale. Melville created, from that point, a novel in which Ahab and his crew pursue the white whale in much the same fashion that the Parkman's and the public pursued the hapless Webster.

Opposition within the press and within the legal profession con-

demne^d Shaw and his court for participating in what was felt to be a spirit of vengeance against the accused, instead of insisting that the case be dispatched in a regular and business-like manner. Heaviest criticism fell upon Chief Justice Shaw, because as head of the court he had permitted questionable procedures in the conduct of the trial. Each of the charges against Shaw's handling of the case finds in Moby-Dick an analogous expression of protest against Ahab's persecution of the whale.

First, professional censure of an atmosphere of vindictiveness has its analogy in Starbuck's outrage against Ahab's manner of seeking out the white whale for a purely vengeful destruction. Starbuck is the voice of prudence, but Melville also makes a special point of portraying the first mate as a business-like man who does not mind chasing whales for the regular motive of profit, but who experiences a moral revulsion against the captain's special interest in one particular whale. Melville's description of Starbuck as a right-minded man whose personal courage has been undermined by life-long commitment to social forms contains implicit criticism of his father-in-law, Judge Shaw. Shaw should have stood up against the pressure exerted by the Parkmans and their influential friends in Boston society. He should not have allowed them to use the Massachusetts judiciary in seeking thorough retribution against Webster.

Melville calls Ahab's personal power over Starbuck a "superior moral force," and, in a sense, the social prominence of the Parkmans

might be called a "superior moral force". In the same way the emotional feeling among the Boston general public which prevailed against Webster may also be termed "superior moral force". Just as Starbuck had Ahab and the ship's "people" to pit himself against should he try to put the whale hunt back on a business-like basis, so also did Shaw have the scions of wealth plus the immediate public to stand up against in any attempt to deal with Webster routinely. Melville dramatized the same idea in a later novel when he portrayed Falsgrave being overwhelmed by the "superior moral force" of Mrs. Glendinning's social position. The Starbucks and the Falsgraves of this world become so used to dealing with the ordinary events of life through the ordinary channels, that they lose their ability to confront the extraordinary situation. In Billy Budd consideration for the security of the state becomes the "superior moral force" which coerces Vere's decision, although in that case it is no longer clear whether such influence is improper.

There is a further analogy to be drawn in between the whaling captain and the Parkman family, if our tired literary critics will permit one last drop to be wrung from Melville's choice of that particular Biblical name Ahab. The Parkman family, which included Robert Gould Shaw, possessed fortunes founded primarily upon the ownership of valuable properties. There is a distinct resemblance between the Parkman family's methods of acquiring their real estate empire and King Ahab's chicanery in wresting the vineyard away from

Naboth, a shady real estate deal if ever there was one. Ahab received his final condemnation by God for his unwarranted persecution of the innocent Naboth. In comparison, the Parkman family took special pains to convince others of their peer group, which controlled most of the wealth and influence in Massachusetts, that their special prosecution of Webster was justified. Moby-Dick's Captain Ahab dissembles his insane motives to wealthy shipowners (i.e., ship-of-state owners) in gaining command of the Pequod. In the name of the rich and powerful, Jezebel suborns the "ancients and chief men" of Jezrahel to procure false witnesses against Naboth in order to convict him of blasphemy and put him to death. In each case, those of great power usurp the machinery of the state for the private purpose of oppressing another.

The analogy between the Parkman-Webster affair and the story of Moby-Dick is by no means complete. Ahab's usurpation of the Pequod leads to the destruction of the ship and its whole crew. On the other hand, a miscarriage of justice, if any, which resulted from the Parkmans' pressure on the court in Webster's case, was not likely to destroy the state or society at large. Yet, one may argue further that such a vision was present to many in the pre-Civil War period.

A connection between Ahab and the sources of wealth in Massachusetts would support the contention of some critics that Melville incorporated in Moby-Dick a broad condemnation of the Northern Cotton

Whigs' collaboration with the South in harnessing the power of established authority to support the institution of slavery.²⁴

In this connection it may be useful to add that in addition to the criticism Judge Shaw took for the Webster trial, he was simultaneously under censure for yielding to the influence of his political intimates, mostly northern industrialists, in remanding the fugitive slaves to their owners (Levy, pp. 86 and 90-91). There were those who feared that the continued policy of the law in keeping slavery alive in America would eventually destroy the union. Melville's choice of names for his shipowners is significant in this respect. Bildad is named for the man who tried to convince Job that man's expedient righteousness can stand up before God's absolute justice; and Peleg is identified in the Pentateuch as he who lived when the earth was divided. It is possible that the latter name is a forboding reference to the civil war that might erupt so long as the state permitted the private interests of wealth to usurp the machinery of government for its own purposes.

²⁴See for example, Charles H. Foster, "Something in Emblems: A Reinterpretation of *Moby-Dick*," *New England Quarterly*, 34 (1961), 3-35; James B. Hall, "*Moby-Dick*: Parable of a Dying System," *Western Review*, 14 (1950), 223-26; Alan Heimert, "*Moby-Dick* and the American Political Symbolism," *American Quarterly*, 15 (1963), 498-534; Sidney Kaplan, "The *Moby-Dick* in the Service of the Underground Railway," *Phylon*, 12 (1951), 173-76; and Willie T. Weathers, "*Moby-Dick* and the Nineteenth Century Scene," *Texas Studies in Language and Literature*, 1 (1960), 477-501.

In the comparison of the Webster affair with Moby-Dick, there are further analogies to be drawn between the more particular objections that were made to the exact manner in which the trial was conducted and the elements of Ahab's whale hunt which appear morally objectionable.

In recounting the general outline of the murder case it has already been recited how the Attorney General, John Clifford, allowed the Parkman family to hire their own special prosecutor in the trial, an unprecedented irregularity. Ahab takes with him a special boat's crew to help insure victory over the whale.

Second, critics of the trial insisted that it had been conducted with a "packed jury". It is true that by modern standards the jury had been insufficiently sounded to see whether they had made up their minds as to Webster's guilt under the influence of the continuing furor in the city.²⁵ Public and professional indignation was also roused, however, because Chief Justice Shaw upheld a recent and controversial Massachusetts statute requiring all jurors in a capital case to give verbal assent to the death penalty. Applying the "packed jury" concept to Moby-Dick, one notes that Ahab calls his crew together and makes them swear their oath that they will hunt the whale to its death, and not hang back until he spouts black blood.

²⁵The Webster case was cited recently by Sen. Ted Kennedy's defense in the Chappaquidick affair as an example of a man tried in the press as a result of an open coronor's hearing; Sullivan, p.45.

The sailors were already prejudiced against the white whale because of his notoriety in the fishery, information based upon hearsay and rumor. Several generations of readers have likewise been persuaded that Moby Dick had a malicious character on the basis of the ill-fame that Ishmael passes along in his narrative.

Furthermore, Webster was prevented by the rules of evidence concerning the incompetency of witnesses from presenting his side of the story at the trial; he was compelled to remain silent while his lawyers did a shoddy job of defense. A similar situation exists in Moby-Dick in which the whale is unable to speak out in his own defense. Starbuck remonstrates with Ahab for seeking vengeance on a "poor, dumb brute," while Ishmael does a dubious job of vindicating the whale.

There remains to be discovered one more important legal issue of the Webster trial (shared by the other homicide cases reviewed in this chapter), which became a critical philosophical problem in Moby-Dick: the difficulty which presents itself when a moral or psychological truth, in this case malice, must be deduced from physical evidence, either of a direct or an indirect nature. Ahab states the problem in Moby-Dick and announces his position (Moby-Dick, p. 264): malice can be deduced from the appearances of nature. Ishmael elaborates on the question several times throughout the novel, notably in "The Whiteness of the Whale" and "The Doubloon". The epistemological problem debated in Moby-Dick is identical to the

one argued so hotly by young, liberal lawyers in the face of the establishment of judges. In legal circles the issue focused specifically upon the right of the law to presume malice, rather than leave the question open to the deliberation of the jury. The epistemological problem in the whaling novel also centers upon whether the whale acts with malice in his homicidal attacks.

Three factors seem to converge in 1850 to fan the embers of this controversy into flame. First, the enormous publicity of the Webster trial limelighted flaws in its procedure. Professional interest in the Webster case was quickened by the prosecution's lack of direct evidence of a crime. (Shaw was accused of, besides other breaches of procedure, permitting the corpus delecti, or the fact of the crime itself, to be established on the basis of circumstantial evidence alone, a charge which prodded even conservative members of the profession to protest Shaw's handling of the case.)

Second, by 1850 an increasing number of young lawyers were more than willing to rebel against some of the heavy, moralistic assumptions taken for granted by "the Age of Sentimentality". This spirit is evident in the support gained by procedural reforms, which were to remove as many forms of presumption from the law as possible, primarily because they were often prejudicial to the truth.

Third, public reaction after the Webster trial tended to regard the defendant as a much persecuted underdog, more a victim of public

hysteria than anything else. Detecting unfairness in public opinion was one matter, however; finding it in the attitude of the Chief Justice was quite another. The perception served to revive Dana's old charge that Shaw's interpretation of the law of malicious homicide was in error. This time what had been a lone voice in the York case, vanquished then, seemed to spring back a hundred-fold and with such increased vigor, that, as we have seen, by 1855, only five years later in the Hawkins murder case, Shaw quietly conceded the fight by dropping his insistence on the law's presumption and allowing the issue to be decided by the jury on the basis of the whole evidence.

Joseph Stone's "phonographic" version of the trial was one of the loudest of the voices.²⁶ The report was enough to send Shaw, Attorney General Clifford, Acting Prosecutor Bemis, and defense counselors Sohier and Merrick into a panic (Sullivan, p. 171). Criticism had been pouring in, especially to Judge Shaw, in the form of letters and pamphlets,²⁷ one of which compared Shaw to the

²⁶James W. Stone, Report of the Trial of Professor John W. Webster (Boston: Phillips, Sampson & Co., 1850).

²⁷Frederic Hathaway Chase, Lemuel Shaw, Chief Justice of the Supreme Judicial Court of Massachusetts, 1830-1860 (Boston and New York: Houghton Mifflin Company and the Riverside Press, Cambridge, 1918), p. 207.

hanging judge of the reign of James II, the infamous Jeffries.²⁸

At the same time that Stone's version of the trial appeared, Stephen A. Phillips, a legal scholar who had succeeded his father on the Monthly Law Reporter, attacked Shaw in the May edition of that journal in a lengthy article criticizing the trial. The following is extracted as much for its tone as for its argument:

The court evidently thought it necessary to secure a unanimous verdict, and such a verdict as would correspond with public opinion. This is the only way that we can account for the extremely arumentative character of the charge of Chief Justice Shaw.

The whole community shudders at the law of malicious homicide as expounded by the Chief Justice:

"There are thought to be two theories on which this is thought to be murder. One is that it was by express malice; and the other that it was by implied malice; that is, if the express malice is not proved, still in cases where there is not accident or suicide, it is murder by implied malice."²⁹

Phillips was probably grossly misquoting Shaw. Stone's version of what was actually said conforms more nearly to previous opinions by Shaw in language and intent:

²⁸Chase, Shaw, p. 208; most of these letters and pamphlets are still among the Shaw papers preserved in the Massachusetts Historical Society Library. In his sentimental biography Chase deplores both the volume and the content of the opprobrium and makes a weak attempt to exonerate Shaw from the charge that his handling of the Webster trial was not all that could have been desired.

²⁹ Stephen A. Phillips, "The Webster Case," Monthly Law Reporter, 3 (May 1850), 1-16.

The authorities. . . proceed to state that the implication of malice arises in every instance of intentional homicide, the fact of the killing being first proved. . . . If there is no justification or excuse in the attendant circumstances, the case will be such as to warrant the conviction of the party. . . . (as quoted in Sullivan, p. 135)

Despite the probable misrepresentation in Phillips' account, the adverse criticism was typical of the impression received and re-created by the opposition.

As a second example of such attacks, here is what another critic of the Chief Justice's charge had to say in the Evening Transcript, front page, for April 18, under the pen name "One of the Suffolk Bar":

But over all and through all, was that fatal error in the law assumed by the majority of the court in Peter York's case viz. that "when on trial for murder, the killing is proved to have been committed by the defendant, it is an act of murder, and proof of matter of excuse or extenuation lies on the defendant." Thus that if the jury came to the conclusion that A died by the act of B, that is enough to convict him of murder, unless B can prove beyond doubt that the killing was under provocation, in mutual combat or in self-defense. The effect of this is to throw all doubts, as to murder, against the prisoner.

The doctrine is derived from old King Canute and the edicts of William the Conqueror, who to protect his robber Normans, laid down the law of murder to be, that if a man was found to be slain it was to be intended in law, first, that he was a Frenchman; second, that he was killed by an Englishman; and third, that the killing was murder.

This is palpably a relic of barbarianism, and in my judgment, and I believe that of most of the bar, it is judicial murder to hang a man under it in the

19th century.³⁰

To review quickly, in each of the trials discussed in this study the issue under debate was not whether the accused had committed the crime, but whether he had done so with malice aforethought. In a Benthamite spirit, defense had taken up the question of whether a moral truth could be deduced from a physical truth. They made the homicide trials out to be a case of trying to ascertain the state of the "invisible spheres," to use Melville's phrase, from the only evidence available in this world, the visible truth. The problem is complicated by the fact that man's only guarantee as to the mere existence (let alone condition) of this inscrutable realm is his highly susceptible moral sense.

In the York case and in the Rogers case there has been in fact many witnesses to the deed itself; yet in the former Dana succeeded in convincing so eminent and respected a jurist as Wilde that though a crowd of people had seen Peter York strike the deceased a mortal blow, not one had been privy to York's thoughts and inner feelings which made up the state of his will, nor could any feat of logic deduce the moral truth from the act itself. In the latter case, Bemis was able to convince a jury of hard-headed laymen that Rogers was a homicidal maniac whose act could not be interpreted at all by "normal" moral standards.

³⁰"One of the Suffolk Bar," "The Webster Verdict," Boston Evening Transcript, 21, No. 6056 (April 18, 1850), front page.

In the Webster trial the problem took on added dimension because the prosecution had nothing but circumstantial evidence to go on. The body said to be that of George Parkman was so dismembered and partially destroyed that identification had to be made by inference from certain details of description. There were no witnesses to any crime having been committed. As a result, the corpus delicti was established by circumstantial evidence. Finally conceding hypothetically all these items, the defense in Webster's case could still as Dana's question whether malice aforethought, the prisoner's deliberate, conscious intention to do an unlawful act, could be deduced from the fact of the act itself. Could the law deduce a crime from a cloud of appearances when it was still questioned, despite Shaw's efforts, whether malice could be deduced from a deed committed in full daylight in front of scores of witnesses?

In Moby-Dick Ishmael is chided for attempting to make up for a lack of first-hand experience by a process of ratiocination:

" Clap eye on Captain Ahab, young man, and thou wilt find that he has only one leg."

"What do you mean? Was the other one lost by a whale?"

"Lost by a whale! Young man, come nearer to me: it was devoured, chewed up, crunched by the monstousest parmacetty that ever chipped a boat!---ah, ah!"

I was a little alarmed by his energy, perhaps also a little touched by the hearty grief in concluding exclamation, but said as calmly as I could, "What you say is no doubt true enough, sir; but how could I know there was any particular ferocity in that particular whale, though indeed I might have inferred as much from the simple fact of the accident."

"look ye now, young man, thy lungs are a sort of soft, d'ye see; thou dost not talk shark a bit. Sure, ye've been to sea before now; sure of that?"
 (Moby-Dick, p. 69)

Malice, said the law as Judge Shaw propounded it, is to be inferred from man's visible acts. In reply to Dana's appeal of the York decision, Shaw spent a good deal of time defining "malice" in its legal sense. The following is an excerpt from that opinion:

Malice in this definition is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill will towards one or more individual persons, but is intended to denote an action done malo animo, where the fact has been attended with such circumstances as carry in them the plain indication of a heart regardless of social duty and fatally bent upon mischief. (Bemis, Webster Report, pp. 156-57; cf. Comm. v. York, 9 Metcalf 102)

I have called attention before to Shaw's selection of this definition from the English commentators, particularly to his choice of the words "a heart regardless of social duty". To this phrase we can now add "fatally bent on mischief" and arrive at a description more nearly befitting the heart of Ahab than that of the creature he pursued.

Leonard Levy summarizes Shaw's definition of malice in light of opinions delivered in the York, Webster, and Hawkins cases:

To laymen malice means ill will, but in law it denotes the mens rea, a state of mind manifested by an intent to do an unlawful act. Since the devil himself, as the

saying goes, knoweth not the mind of man, how can the malicious state of mind be proved? The answer is that malice can be implied sic from the facts proved by the whole evidence. (Levy, p. 223)

According to legal authority past and present, therefore, malice is to be inferred from man's visible acts, with the usual safeguards of the jury system for the normal distortions of moral sense among individuals. Even so, the answer can never be certain. Since no conclusive connection can be made between the invisible and the visible, man must leave open the possibility that the truth of the universe may well be indifferent to moral truth. If so, of what significance is man's perception of moral value in any of its events, particularly value assigned by individuals isolated from society, individuals who act without regard to social duty, without reference to any mores or human laws whatsoever? Such perceptions and valuations are conditioned arbitrarily upon the individual's disposition and circumstances. If one sees moral perceptions derived in the above way, then, as Bentham suggested, they may range a complete spectrum from good to bad; they are thus of existential value only, unless conditioned by empirically determined obligations to the rest of humanity.

It may be assumed at this time that Melville had some knowledge of the legal definition of malice, and it is easy to demonstrate another carefully constructed ambiguity: that is, whether malice

may be assigned to Moby Dick or to Ahab. The whale acts, by all the evidence, with what appears to be deliberate, intelligent, aforethought malice. Yet the whale, by legal standards has every justification for his deeds: he is protecting himself and his kin from murderous attacks. Ahab, on the other hand, acts, as noted above, with a "heart fatally bent on mischief" and "regardless of social duty". He is clearly culpable of malice, or a malo animo, in its legal sense, and his malice, unlike that of the white whale, is avowedly premeditated. Yet Ahab, like the acquitted Abner Rogers, is insane, and thus not morally culpable. The captain too must be excused.

Phenomenologically speaking, there is no judgment of good or bad which can be assigned by worldly understanding to the actions of this mad captain and the whale he pursues. The unreturning wanderers, who are the crew of the Pequod, says Melville, go "to lay the world's grievances before that bar from which not very many ever came back" (Moby-Dick, p. 108). What bar, may we ask? The answer lies in the story. Melville has chosen the most barbaric mode of justice as the only test possible in life. The trial of Ahab v. the whale is a trial by combat, and Ahab musters his "Knights and Squires" for the occasion.

Whatever the outcome of such a trial, men will insist upon assigning values of good and bad, but it is possible that Melville means to suggest that the truth is beyond that. The issue of the contest becomes for the parties involved a judgment by Fate as to what, simply, shall be. For Fate, as the ancients believed, is

superior even to celestial rule. It is a mysterious, impersonal force, which moves along sweeping gods and man alike in its unchanging flood. Indeed the old concept of Fate bears a remarkable resemblance to modern theories of the naturalistic universe. Although Darwin did not publish his Origin of the Species until nearly ten years after Moby-Dick had been written, it has been demonstrated frequently that the idea of the "survival of the fittest" was incipient in many areas of thought during this era. It is, therefore, not at all surprising that Melville should have conceived of trial by combat as the most appropriate climax for this modern morality play.

In a way that showed a rough but adequate knowledge of legal apparatus, Melville made his own procedural choice for reviewing the decision of the bar before which the unreturning crew of the Pequod went to lay the world's grievances. He takes a preliminary deposition from his only eyewitness, Ishmael, in the chapter, "The Affidavit" (Moby-Dick, pp. 175-82). In the opening of this chapter Melville remarks upon the paucity of "narrative" in the book. He goes on to have Ishmael say,

I care not to perform this part of my task methodically; but shall be content to produce the desired impression by separate citation of items, practically or reliably known to me as a whaleman; and from these citations, I take it---the conclusion aimed at will naturally follow of itself. (Moby-Dick, p. 175)

The term "narrative" is defined by legal dictionaries as the case that a lawyer presents to the court after weaving all the facts made available to him into a story that is favorable to his client. The narrative is what a lawyer uses to cast the evidence into the light that he wishes the judge and the jury to see it. The alternative is to lay the whole evidence before the court, item by item, and let the jury draw its own conclusion. This is the procedure followed in a court of common law when facts alone are to be decided by a jury with the guidance of a judge. It is also the process used in open inquiry as in a coroner's inquest or a grand jury investigation.

Melville's failure to "narrate" the case of Ahab v. the whale or to return a conclusive verdict continues to provoke readers who do not wish to draw their own conclusions, but would rather prefer that Melville had placed a judge over the novel to argue the case and to charge upon the evidence, some narrator who would have eschewed the Shandean compulsion to tell all there is to tell apparently in the order it gets told. As modern criticism has shown, however, Melville's brief takes on the burden of both prosecution and defense in a careful orchestration of ambiguity and ambivalence.

Melville has refused to give us the narrative coherence of traditional form. Instead, he made a deliberate commitment to reject conventions of form because such constructions tend to prejudice the reader against the "natural verity" of the materials themselves. He reduced his composition to a separate citation of items which he

delivers with an eye mischievously on the science of evidence to maintain the most foolproof of unsolvable ambiguities.

The knowing reader, however, is not excluded from the joke; Melville comments frequently enough upon the quality of the evidence, designating some as hearsay, worrying about the competency of witnesses, introducing "expert" testimony, presenting ancient documents, and warning his readers in spots by evaluating evidence for the credence that may be attached to it. Whatever judgment he makes, however, about the quality of the materials throughout the book, he lays them nonetheless before his jury of readers in "endless processions."

In the analogies of form to be found in the legal controversies that raged among his friends and relatives in the mid-forties and early fifties, Melville lighted upon a philosophical basis for his own curiously modern brand of impressionism. The methodology of legal inquiry could well have suggested the validity of a properly constructed pastiche as a way to produce the effect needed in his attempt to paint what he knew to be "invisible spheres". He moves through his novel like a judge delivering his charge, reviewing the evidence along with the interrogation of witnesses, but reserving the verdict for his jury of readers. He offers only hints that the issue was perhaps already resolved the only way possible, in the final combat, whereby fate alone was able to pass judgment with conclusive force on the merits of Ahab v. the whale.

Like the lawyer who defends a man he believes to be a criminal, like the prosecutor who must help try a man he thinks is innocent, Melville carefully sidestepped responsibility for the judgment to be passed upon the events of the novel. He probably believed that no one should ever be able to settle them to a certainty given the epistemological conditions he provided in the book (see Chapter III, supra, concerning Melville's use of the rules of evidence).

Melville's acknowledged readiness to borrow material from whatever source presented itself paid rich rewards when the course of his life brought him into intimate contact with Judge Lemuel Shaw. Though reputed to be a tough disciplinarian on the bench, Shaw was also a kind father, a loving husband, and a warm personal friend. With these obvious humanities he also occupied the office of Chief Justice of Massachusetts for 30 years of increasing dilemma as the United States wandered on the brink of civil war. He was crucified repeatedly in the press, North and South, not only with the hysteria displayed over capital cases, religious quarrels, and business disputes, but with a bitterness only the spectacle of the Fugitive Slave trials could have provoked.

The young writer may have condemned what he felt was an inevitable and ignoble weaking of the personal moral force in a man with Shaw's commitments; but his privileged observation of the judge's painful ordeal on the bench provided him with a living source for creating the depth of moral vision his work required. While it is

true that both Moby-Dick and Pierre contain implicit criticism of his father-in-law, the passing years may have enabled Melville to feel compassion for Shaw as he struggled in his perplexing and lonely position. Understanding for the daily dilemma of the judge is apparent in Melville's grudging but unmistakable admiration of Franklin in Israel Potter, and in the slow crescendo of sympathy for both clerk and master in Bartleby. In the end it was perhaps mature reconsideration of the career of Lemuel Shaw, one of the most eminent jurists of the century, that made it possible for him to create the unforgettable tribute to the anguish of Pilate which emerges in Billy Budd.

Chapter V

Codification, or the Ambiguities

The left-wing Democrats that Melville met through Evert Duyckinck were involved in practical schemes to reform the law. They had three pet projects in the 1840's: constitutional revision; an overhaul of the court system; and the codification of the law. Members of the legal establishment considered the last of these the most radical, and for that reason they engaged its proponents in some of the most heated debates of the era.

Codification was the name applied to the process whereby the unwritten laws, those contained only in precedent court decisions, were gathered up and formulated into a "code," or a body of rules. These were to be used like statutes, as the law to be applied in any case brought before the bar. The alternative, established method was to research each case for any possible court decision that might apply and to derive a rule for each case individually as it came up for trial. Modern practice is to use a code, but to modify its application by reference to precedent case law. In Melville's day, however, the very idea of turning the Common Law into a code was anathema to the vast majority of the legal establishment.

Numerous authors in the last ten years have tried to evaluate

the influence of the New York group's radical politics upon Melville's development.¹ Others have analyzed his attitudes toward authority by using as starting points biographical information about his life-long servitude in ships and in the Custom House or his experience in the South Seas.² Most of this criticism, however, deals with the idea of democracy only in its most general form. Discussion of specific issues has been limited to slavery, presidential elections, the growing power of industrialism, and events in the Carribean. None of these, except possibly slavery, are primarily legal questions. The present chapter explores the possibility that issues which emerged from the agitation for law reform in New York state may have played a significant role in determining Melville's ethical concepts.

Fundamental issues of the codification controversy affected Melville's work. They flavored his interpretations of life in the South Seas, and may in fact account for Melville's report on the deleterious results brought about by the code of blue laws imposed by missionaries on the natives custom and usage. Pierre may be read as a dramatization of the opposing sides of the codification

¹See Leonard Engel, "Melville and the Young America Movement," Connecticut Review, 4, No. 2 (1971), 91-101.

²See for example John Bernstein, Pacifism and Rebellion in the Writings of Herman Melville (The Hague: Mouton, 1964); Nicholas Canaday, Jr., Melville and Authority, University of Florida Monographs, Humanities No. 28 (Gainesville: University of Florida Press, 1968).

and law reform movements. In addition, the dichotomy of the ideal and the real in conflicting views about the source of the law is a great help in explaining the roots of the problem presented in Billy Budd. The battle fought over codification among lawyers and jurists is the best probable source of Melville's condemnation of the idealist and the extreme rationalist as the most dangerous kind of fool.

Among Melville's friends in New York City were several who figured in the attempt to codify the laws of the state. David Dudley Field, a member of the "Young America" group and a neighbor of Melville during the 1850's in the Berkshires, and Alexander W. Bradford, Gansevoort Melville's Albany and New York City acquaintance, played prominent roles in the fight. Both these men were members of the codification commissions set up by the legislature in the late 1840's and 1850's. Field is known today as the "Father of Codification" because of his lifelong efforts to get the codes written and to get them accepted by legislatures, not only in New York, but in the entire world. In addition, political journalists Mathews and Bryant, both of whom belonged to Duyckinck's and therefore to Melville's literary circle, occasionally contributed by writing articles supporting codification. Mathews, for example, wrote magazine satires, much in the manner of Dickens, on the ponderous, outmoded court system.

Finally, in 1850, Evert Duyckinck opened the pages of the

Literary World for debate on the subject, thus providing further evidence of the group's interest.

Perhaps it is necessary at this point to supply a brief history of the codification controversy during this formative era in American law.³

When the British colonists came to America, they brought with them the Common Law of England. This body of law is not to be found written in any book. Instead, having grown up from the customs and usages of the English people, it was to be found embodied in the decisions of the courts and in the commentaries made by eminent jurists. To this body of unwritten law were added all the statutory laws of England and, in addition, whatever statutory law was passed by colonial assemblies.

After the Revolution, the state legislatures passed acts which declared that the English Common Law, plus all statutory laws of England which had been passed before the Revolution, was still in effect, except those parts which were repugnant to the concepts of a free government. In addition to this law there was the statutory

³Alison Reppy, "The Field Codification Concept," in David Dudley Field: Centenary Essays, ed. Alison Reppy (New York: New York University School of Law, 1949), pp. 17-54; Perry Miller, "The Common Law in Jacksonian America," The Proceedings of the American Philosophical Society, 103, No. 3 (1959), 463-68; Roscoe Pound, "David Dudley Field: An Appraisal," in David Dudley Field: Centenary Essays, pp. 3-16; and by the same author, The Formative Era of American Law (Boston: Little, Brown and Co., 1938).

law of the state and the state and federal constitutions. The foundation of American law, however, was the English Common Law. Despite Anglophobia, it was impossible to go to court in America without the English Common Law, even in constitutional cases, because the Common Law regulated court procedure. The Common Law also governed the interpretations, and therefore the effective law, of the constitutions themselves.

In 1830, when Lemuel Shaw became Chief Justice of the Massachusetts Supreme Court, the debate over whether America should accept the English Common Law on a permanent basis was far from settled. The establishment of older lawyers and judges, of which Shaw was a part, supported the British system, not as a temporary relief measure for the young republic, but as a time-tested body of wisdom and jurisprudence which America could ill afford to lose. For a long time, those who wished to see the Common Law adopted had the advantage over their opponents, because there was nothing here to replace it. In any case not covered by a statute, the Common Law had to be relied upon, even by its worst enemies.

Those who objected to the Common Law had several complaints. First, it was not written in any systematic form and was therefore difficult to know. The people had limited access to the law. As a result they were dependent upon lawyers to conduct their business and upon judges to tell them where justice lay. Second, the precedents of the Common Law were criticized for being more appropriate

to the problems of an earlier age and a different country than to those of nineteenth century America, a difficulty which increased as economic conditions diverged more and more from those of the past. Third, the complex and rigid procedures of the Common Law made justice expensive and time-consuming.

Most of the judgeships, certainly those in the courts of last resort---like those of the Massachusetts Supreme Judicial Court where Melville's father-in-law, Lemuel Shaw, sat---were appointive, not elective. It is therefore not hard to see why Jacksonian Democrats and their successors tilted so earnestly at the prerogatives and privileges of the judiciary. The Whigs, on the other hand, particularly those whose wealth was in property rights rather than commerce, were understandably content with a legal procedure "feudally conceived" and with the technicalities of the chancery court which kept property a frozen rather than a liquid asset.

For the above reasons a faction had grown up that wished to replace the Common Law with a written code such as the one that Napoleon had set up in France. These reformers began their most resounding attack in the days of the Jacksonian democracy. They proposed to digest the scattered elements of the Common Law, embodied only in the implications of the thousands of historical cases decided by the English bench, into a set of abstract principles to be used in deciding all cases in the future.

Commissions had been formed in several states to study the

idea of codifying the law. In Massachusetts agitation led by Robert Rantoul had resulted in a study which returned its report as early as 1836. The project was headed, however, by Joseph Story, who coerced its findings into his own legal theories. These ideas supported the Common Law and merely called for more American commentaries upon it.

The situation in New York was somewhat different. New York was a hotbed of the radical Democrats. The legal establishment there did not take the initiative in dealing with the pressure as the Massachusetts bar had wisely done, but left the project in the hands of those genuinely interested in radical reform.

David Dudley Field opened his fight in 1839, long before he knew Herman Melville. He began agitation at the instigation of Henry Sedgwick, by publishing his Letter to G. C. Verplanck on the Reform of the Judicial System of This State.⁴ In this pamphlet he argues for a constitutional amendment to authorize either the legislature or the judiciary to reform itself without further recourse to constitutional amendment. Field led the agitation throughout the 1840's, making speeches and publishing pamphlets in favor of the codification concept. The most notable of these was a treatise which appeared in January, 1847, What Shall Be Done with the Practice of the Courts? Shall It Be Wholly Reformed?

⁴David Dudley Field, Letter to G. C. Verplanck of the Reform of the Judicial System of This State (New York: n. p., 1840).

Questions Addressed to Lawyers, a copy of which, bearing the signature of Herman Gansevoort, is to be found in the Gansevoort-Lansing Collection of the New York Public Library.⁵

In 1846, the constitutional reforms which Field and the other Democrats had pushed for the overhaul of the court system had gone through in large part, and the legislature had been empowered to reform procedure. By 1847 he had persuaded the legislature to set up a commission to study the question and to write the code as well. After getting himself appointed to the commission, he lost no time in writing the procedural code, which combined in one process the features of the courts of both law and equity. This code was adopted by the New York legislature in 1848, procedure being the area most conspicuously in need of reform.

Meanwhile Field continued codifying the criminal and civil parts of the law and submitted these late in 1849. His criminal and civil codes, however, ran into the backlash of conservative elements of the legal profession who felt that things had progressed too far already with the reorganization of the judiciary and the adoption of the procedural code. In January, 1850, they voted down any further codes, and by April, repealed the codification commission itself. It was just at this point that we find Herman

⁵David Dudley Field, What Shall Be Done with the Practice of the Courts? Shall It Be Wholly Reformed? Questions Addressed to Lawyers (New York: J. S. Voorhies, 1847).

Melville and Field hobnobbing during an August picnic in the Berkshires.

Shortly thereafter, Field got busy campaigning to revive the issue in the state. He wrote several pamphlets, including the following three: The Administration of the Code; A Short Manual of Pleading under the Code; and The Codification of the Common Law.⁶ By 1857 the legislature had reauthorized a codification commission, known as the Field Commission, and the work of writing the code was resumed. On this second commission was Alexander W. Bradford, Gansevoort Melville's old friend; he helped with that portion of the civil code relating to the estates of deceased persons.

Although the Field codes were not accepted in New York State until the early 1880's and then only in a much revised form, they were adopted eventually by twenty-six other states, primarily those newly formed out of the territories. In addition, the codes played a significant part in the English Judicature 1874 and in the development of Indian jurisprudence.

It is useful at this point to compare the chronology of the controversy with the dates of Melville's writing. Although agitation to open the question of codification had been going on in America since the end of the 18th century, it was not until the

⁶Henry Martin Field, The Life of David Dudley Field (New York: Charles Scribner's Sons, 1898), pp. 69-70.

1840's that any significant activity began in New York. Field published his first pamphlet in 1839, but his most intensive and effective efforts were made in 1846-47. Field was agitating for these reforms, with the aid of men whom Melville knew quite well, just at the time when the latter was writing Typee, Omoo, and Mardi. In 1850, while Moby-Dick was in progress, a second period of agitation began when Field's codes were rejected and the first codification commission disbanded. We have already noted Melville's association with Field at this time, and the simultaneous appearance of the issue in the Literary World. Pierre also belongs to this second period of agitation, as do Bartleby and Israel Potter.

The codification controversy was interrupted in America by the Civil War, and it was not until the late 1870's that effective action on the question began once more in New York State. The Albany Law Journal, which began publication in 1870, carried many articles on codification, some of which specifically attacked the code's weakness on the law of malicious homicide, another issue of continuing interest to Melville. A criminal code was eventually accepted by the New York legislature in 1883-1884. In 1878, Melville returned to the problems of codes and judge-made law in writing Billy Budd.

The scheme of argumentation of the codification debate was as follows: first, the nature of man had to be settled; second, the nature of law in relationship to man; and third, a resulting political

philosophy.

Preliminary to his discussion of two concepts of nature in Billy Budd, John Noone paused to make the following observation:

Perhaps the first impression a student receives upon reading Billy Budd, Foretopman, is that it reflects something of that clash of ideas which gave such vitality to the 18th century. Without asserting an historical connection between specific works of Hobbes, Locke, and Rousseau, on the one hand and Billy Budd on the other, it appears that Melville has drawn upon these systems insofar as they are symbolically represented in some vague "climate" or "stream" of intellectual history.⁷

After examining the debates of the legal reformers, and codifiers in particular, one need no longer cast about for this "historical connection" or to view Melville's source as merely some "vague 'climate' or 'stream' of intellectual history." The codification issue had re-opened the eighteenth century clash of ideas about the nature of man versus the nature of the laws that govern him.

In October, 1841, and January, 1842, there appeared in the American Jurist a lengthy two-part article by J. Louis Telkampf of Union College, Albany, who argued in favor of codification.⁸

⁷John B. Noone, "Two Concepts of Nature in Billy Budd," American Literature, 29 (1957), 249.

⁸J. Louis Telkampf, "On Codification, or the Systematizing of the Law," American Jurist, 26, No. 51 (1841), 113-144 and No. 52 (1842), 283-329.

Telkampf begins the discussion by reminding his readers that there were two basic concepts of law in juristic thinking. The first was the notion of the law as a mere texture or web of external restrictions placed upon man in society like a loose fitting garment in order to bring him into the minimal cooperation required by social living. He points out that this concept is founded upon the idea of human nature which is basically Hobbesian (De Cive) and entertained as well by Spinoza, Hume, Haller, Hugo, and Fichte. To these thinkers man is basically irrational, swayed most by his needs, desires, and illusions. The social contract improves his lot by bringing order into reality, but the order may be expedient and arbitrary. The law, by these lights, is "but an empty shape" (Telkampf, p. 117). If one accepts fundamental irrationality at the base of our social restrictions, Telkampf asserts, "it might easily occur that the same thing should be both right and wrong at once; and thus morality and law would have been reduced to a chimera" (Telkampf, p. 117).

Melville explores this problem in Pierre. In fact, the premise suggested by Telkampf becomes that of the protagonist in the novel, when Pierre decides that the social restrictions lodged against Isabel and Delly Ulver are without reason. By the end of the book, Pierre soon finds that he has reduced vice and virtue to chimeras, ironically because he attempted to replace the time-honored rules with ones of pure ratiocination.

The opposing view, as described by Telkampf, sees law not as arbitrary or expedient, but as founded upon the law of God and Nature and as growing out of the rational nature of man. It is not an empty shape, but a solid structure rooted in man's essential being. This idea of the law was entertained by Socrates, Xenophon, and Plato, among the ancients, and by Blackstone, Hooker, Grotius, Montesquieu, Rousseau, Leibnitz, Kant, Hegel, Krause, Wolf, and Hoffman, among the moderns. It is the view of law, said Telkampf, espoused by those who believe that the law can be codified, or systematized. "The source of the law is in the ideal. We may define law as the result of reason applied to the external affairs of man; when applied to the internal affairs, it is called morality" (Telkampf, p. 121). Later we shall see some of the problematic ramifications of locating the source of the law in the ideal.

Telkampf's assertion that he and others who wished to codify the law rejected the Hobbesian doctrine implied that anyone who opposed their efforts did entertain these cynical opinions; and, in all justice to this inference, it is not difficult to imagine that the conservatives of the legal establishment and their cohorts in the American aristocracy of wealth would have readily contemplated the encroaching masses with just this squinting Hobbesian misanthropy. At any rate, that the Common Law advocates were not above describing some parts of the law as arbitrary is evidenced by the following extract from a friendly review of Kent's Commentaries,

which had just appeared in a new edition in 1840:

In what we have been saying, it has been taken for granted that the case actually had a right and a wrong side; but it is clear that there must be matters in which it is not so much importance in how the law is fixed, as that it should be certainly fixed; and in all cases we should expect to find the judges adhering steadily to that which they might have found in use, without regarding any other consideration than the desire of firmness and stability.⁹

Kent himself says in the Commentaries that a distinction is to be made between those laws arising out of the principles of natural law and those which are merely positive law decided somewhat arbitrarily by whatever power of the state happened to hold sway at their foundation. Yet Kent is careful to advance the claim in behalf of such laws that these sections of the positive law---mostly concerning real estate and legal procedure---are not entirely arbitrary or divorced from reason.¹⁰

The British Common Law had indeed grown "like Topsy" through the centuries. It had never been formulated all at once by the light of rational principles alone. Thus there was some justification to the charge that there was much in the Common Law which had evolved from arbitrary and non-rational motives of interest. The history

⁹"E. L. C.," review of Kent's Commentaries on American Law by Jas. Kent, 4th ed. (1840) in American Jurist, 25, No. 49 (1841), 104.

¹⁰James Kent, Commentaries on American Law, 4th ed. (New York: printed for the author, 1840), p. 1.

of the English law, if not that of all law, seemed to support Hobbes' theories.

The codifiers chose to base their arguments upon a Rousseauvian ideal of man. This viewpoint accorded well with their other democratic notions; but the position required a curious retreat, as Noone has indicated, to philosophical ideals long since put aside, and to a replay of a debate rehearsed nearly a century before. The codifiers were defeated in the first round by broadsides from the same arsenals of empiricism and "common sense" which had blasted the detached rationalism of the prior neo-Platonic revival. Nevertheless, they did succeed in reviving the controversy over the importance of the nature of man to the nature of the law, and raised questions as to the kind of wisdom needed for solving ethical dilemma. One noted scholar in American history has concluded that the enormous quantity of impassioned rhetoric expended in the codification struggle was really directed at contrasting ideals of American society (the democratic possibility v. the rule of established interest),¹¹ rather than toward the immediate issues of law reform per se.

Herman Melville's orientation on the above question seems basically Hobbesian. His difficulty was in reconciling this assumption with an equally strong belief in democracy. In the early work,

¹¹Perry Miller, The Life of the Mind in America from the Revolution to the Civil War (New York: Harcourt, Brace and World, Inc., 1965), pp. 254-55.

Typee, Melville is willing to speak of natural man in the tone of Rousseau's approbation. Yet the qualities for which the primitive is admired in Typee are indwelling principles of virtue and robust health. Neither of these have anything to do with men's rational faculties or with the idea of Nature as essentially rational. Instead, Melville finds that the primitive is motivated by innate impulses and governed by mysterious taboos.

In Typee, no essential distinction is made between the civilized man and the native. Melville's juxtaposition of the cannibal king with the French admiral du Petit Thouars, ostensibly for the purpose of contrasting them, is filled with ironic overtones. A few pages preceding he had raised the question as to who might properly be called a savage in the light of the European atrocities committed against the islanders, which, "proclaimed to the pagan inhabitants the spirit that reigned in the breasts of Christian soldiers."¹² Between the Frenchman and the Polynesian there is a difference created by the effects of civilization, which had in the case of the admiral "gradually converted the mere creature into the semblance of all that is elevated and grand" (italics mine, Typee, p. 29). The French admiral represented the most civilized, most "rational" people in the world; the naked island chief, the most non-intellectual,

¹² Herman Melville, Typee, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston and Chicago: The Northwestern University Press, 1968), p. 26.

natural people to be found. Yet, Melville suggests, the difference between them is an illusion. The civilized man is no less a savage than his primitive counterpart. In fact, the white civilized man is "the most ferocious creature on the face of the earth" (Typee, p. 125).

It is interesting to note also that Melville's criterion in judging the relative merits of the primitive and the civilized man is in terms of the Benthamite emphasis on "the greatest happiness," which is in itself a non-rational good feeling. Elsewhere in the novel he tells the reader that "despite all the advantages of his condition, the Polynesian savage, surrounded by all the luxurious provisions of nature, enjoyed an infinitely happier, though certainly a less intellectual existence, than the self-complacent European" (Typee, p. 124). One's happiness, therefore, did not appear to be dependent upon the development of the rational faculty at all.

John Bernstein has noted in Pacifism and Rebellion in the Writings of Herman Melville that one of the motifs in Typee and Omoo is the "noble savage" contrasted with the "corrupted savage".¹³ By extension, one can infer that the corrupted savage is not just the Polynesian degenerate of Tahiti, but the civilized European as well. Furthermore, if one were to ask exactly what it is which has

¹³John Bernstein, Pacifism and Rebellion in the Writings of Herman Melville (The Hague: Mouton, 1964), pp. 20-21.

corrupted the natives and the whites alike, the answer would be the imposition and strict maintenance of arbitrary codes which tend to distort human nature, for example, the missionaries' imposition of Christian rationalism upon the natives. In Typee Melville specifically condemns the pernicious effect that arbitrary codes have had upon western civilization (Typee, p. 201).

In many respects, according to the picture presented by Melville, civilization and Christianity had canonized and overdeveloped the unlovelier aspects of man's inclinations: vanity, greed, lust for power. Left in surroundings close to a state of nature, these dispositions are meliorated and subdued by constant contact with the harmonious bounty of creation. The rational faculty, when not kept in its proper place, only tends to usurp nature, often to no felicitous end.

In Typee and Omoo Melville demonstrated that there is no essential intellectuality in nature. The rational order found in the law of nature is a peculiar emphasis of civilized man. The European, even more than the Polynesian savage, places faith in systems of signs and codes, which are seen upon close scrutiny to have their origin in our own mysterious impulses coupled with the fortuitous course of event. Civilized man is duped by the credulous faith that the rational faculty is the only valid path to the truth. As Melville wrote to Hawthorne,

. . . perhaps, after all, there is no secret. We incline to think that the Problem of the Universe is like the Freemason's mighty secret, so terrible to all children. It turns out, at last, to consist in a triangle, a mallet, and an apron,---nothing more!¹⁴

In Mardi Babbalanja and Media carry most of the discussion about the nature of man. Babbalanja's "diabolical theory" is a case in point. He lays it down as a maxim from old Bardianna that all men are bedeviled; i. e., all men are possessed by devils, or as he says, more properly speaking, the devils are possessed by men. His own, Azzageddi, seems to break out in raving whenever Babbalanja in his meditations or discourses seems to be getting close to the inmost nature of things. The closer one gets to truth, the more inadequate rationality becomes. Elsewhere Babbalanja remarks upon the difficulty of trying to communicate in any rational way the deepest part of his being. He speaks of the "world of wonders ensphered within the spontaneous consciousness," and of his error in trying "to invest sublunary signs with celestial sense."¹⁵ He tells Mohi that "truth is in things, and not in words, truth is voiceless" (Mardi, p. 283). Man's deepest apprehension of reality is in the mysterious communing

¹⁴ Herman Melville, The Letters of Herman Melville, ed. Merrill R. Davis and William H. Gilman (New Haven: Yale University Press, 1960), p. 125.

¹⁵ Herman Melville, Mardi and a Voyage Thither, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston and Chicago: Northwestern University Press and the Newberry Library, 1970), pp. 352-53.

of his being with all that is.

The philosophers of Mardi do not reject reason entirely, but insist it be assigned to its proper place. There is no impiety in the right use of our reason (Mardi, p. 426). Reason was the first revelation, and Babbalanja goes on to explain:

. . . so far as it tests all others, it has precedence over them. It comes direct to us without suppression or interpolation; and with Oro's indisputable primatur. But inspiration though it may be, it is not so arrogant as some think. Nay, far too humble, at times it submits to the grossest indignities. Though in its best estate, not infallible; so far as it goes, for us, it is reliable. When at fault it stand still. We speak not of visionaries. But if this our first revelation stops short of the uttermost, so with all the others. (Mardi, p. 576)

In the groves of Alma Babbalanja asks whether faith in Alma does not conflict with reason. He is told that Right-reason and Alma are the same, or else Alma would be rejected; but Alma must be known through love, not reason. Thus the followers of Alma accept his precepts and "seek no comment but our hearts" (Mardi, p. 628).

In Mardi, therefore, Melville argues that man does indeed possess a rational faculty, and that God too is rational ("in his faculties, high Oro is what a man would be," Mardi, p. 426). Yet existence itself cannot be reduced to one of its attributes, and those who would confuse the two mistake one path toward the truth for the truth itself. In his wandering search through the universe for

wisdom man is ever thrown back upon the promptings of his heart, that primitive, non-rational, if not irrational, part of his nature, for his deepest apprehensions of being.

Yet another clue to Melville's ideas about the basic nature of man is afforded by his choice of the name "Ishmael" for the observing narrator of Moby-Dick. The Biblical character of that name was called a "wild man," and one is reminded of Cooper's use of the name in The Prairie (1827). In that work "Ishmael Bush" is the name of the brutish, low-browed character who roamed the prairie guided by his instincts and passions, not by what little intellectual capacity he possessed. Likewise, Melville's Ishmael was guided by the promptings of his own irrational "hypo" and by the impulsive confidence he placed in Queequeg over the choice of the Pequod. Once on board, he found himself inexplicably drawn into Ahab's fantastic hunt. His participation in the captain's mad chase is still another non-rational decision of his mind.

In Moby-Dick Melville is fairly explicit about his concept of natural law. Although nature can be bounteous and harmonious, its balance is not static. Change goes on constantly, as in the flowing balance of an ecological cycle, for example. In Typee the Polynesians were admired for their unspoiled natures, especially in contrast to their European counterparts. Yet the reader was never allowed to forget that they were after all cannibals only tenuously restrained by notions of hospitality toward their outlandish captive.

By the time Melville was writing Moby-Dick, his emphasis shifted from the bounty of nature to what he called its "universal cannibalism".¹⁶ Cannibalism is one of the motifs of that book, manifested in the Queequeg-Ishmael relationship, the decoration of the ship, the nature of her crew, etc. The reader who keeps the idea of "natural law" Melville presented in Moby-Dick in mind while reading Billy Budd will begin to suspect that many critics of that work have been holding the picture upside down, so to speak. We shall return to this point at the end of the chapter.

Pierre's Isabel is a female Ishmael. She is an outcast, a by-blow of the human race. She too was motivated by her impulses, and (like Babbalanja) by incoherent mystical assurances of identity emanating from some source deep within her own being. She exerted a physical and spiritual magnetism over Pierre, which drew him "wantonly, ignorantly, and unintendingly."¹⁷

People must make constantly what the existentialists call a "leap of faith". Before ratiocination can begin, they must commit themselves to their premises; or, like the wretched infidel in Moby-Dick's "The Whiteness of the Whale," they would gaze themselves blind

¹⁶Herman Melville, Moby-Dick: An Authoritative Text. . . , ed. Harrison Hayford and Hershel Parker (New York: W. W. Norton and Company, Inc., 1967), pp. 235-36; cf. also pp. 255-56.

¹⁷Herman Melville, Pierre, or the Ambiguities, ed. Harrison Hayford, Hershel Parker, and G. Thomas Tanselle (Evanston and Chicago: The Northwestern University Press and The Newberry Library, 1971), p. 151.

staring at the leprous, palsied universe (Moby-Dick, p. 170). In a number of works Melville portrayed humanity as the dupe of its absolute need to believe (Mardi, "Faith and Knowledge," pp. 296-97). A person's particular beliefs are determined by the evidence of his or her senses tempered by his or her desires, which in turn arise out of the non-rational part of human nature interacting with the fateful course of events.

Thus even the casual reader of Melville's work must soon come to the conclusion that the author was preoccupied with settling the question of man's basic nature and its relationship to the order in human reality. It is significant that as early as Mardi he was drawn to the conclusion that the rational faculty is inadequate, that the deepest apprehension of the truth cannot be captured by a mere sequence of language. "Truth is in things, not in words," says Babbalanja, thus signifying the futility of any effort to abstract truth fully into written, "codified" principles. Codes can only distort truth. Truth must always lie immanent in the ongoing experience of existence.

For this reason, as might be expected about his commitments about the nature of man, Melville could not have shared his friends' wish to see the law codified. His thinking follows that of the opposition that wanted to leave the law embodied in custom and usage, and in precedents. The past must act as a guide, but not a dictator, to future decision making.

These thoughts bring us to some approximation of Melville's attitude toward law and his preoccupation with the outlaw or renegade. Because man is liable to the delusions of imperfect wisdom, whether they stem from the imagination or from the rational faculty, and because he is further subject to being bedeviled by the irresistible promptings of a non-rational will, law is a necessary restraint without which man would do his fellows harm. Furthermore, law embodies the human wisdom available to create the equitable situation of allowing individuals the greatest freedom possible in our social condition. The plot of Pierre demonstrates what happens when law, as well as custom and usage, is put aside. Yet because the nature of man and the universe cannot be crystallized once and for all in the institution or in any written body of absolute, ideal principle, there is always a part of man left out, not taken care of, by the systems of law which man creates. No matter how perfect or right such law may seem to be, it is never to be mistaken for a definition of man's essential nature or the nature of existence. The search for truth must always remain open---"Mardi behind, an ocean before" (Mardi, p. 652). Each man must always remain, in his deepest nature, an outlaw and a renegade, if he stays true to himself and to the ideal of a more perfect wisdom always to be attained sometime in the future.

One of the questions which codifiers and Common Law advocates debated with some confusion, until they were interrupted by the Civil War, was whether it were possible to formulate precisely in

written form the rules and principles of law. Systematizing had already been accomplished to some degree in digests, indexes, and comprehensive commentaries. Some Common Law proponents were even willing to concede that the criminal law and the political law might be codified, but upon the unwritten civil law, that which controlled contracts, real estate, inheritance, tort actions, etc., they stood fast. They did not deny that the principles and maxims of this law were reasonable, but argued, instead, that in an abstracted form such rules were unserviceable without the attendant details and circumstances out of which they arose. Separating such principles from their origins in actual cases would lead to a distortion of their meaning and to a source of ambiguity for future decisions. They argued that such ambiguity could be resolved only by the medieval method of philological interpretation, a debate of definitions and intentions referable to the authors of the code, or by a return to the vast body of reports that the code was supposed to supersede. If the first method were to be followed, the ambiguity of language divorced from its concrete antecedents would produce only confusion. If the latter course were chosen, the code would be practically useless except as another index.

The argument, for our purposes, may be reduced to four parts. First, is it possible to lay down universal maxims, no matter how rational, which divorced from contingent circumstances, could once and for all determine decisions in all possible cases in the future?

Second, does ambiguity result when ideal abstractions are used as a guide without considering the concrete realities out of which these arose? Third, was it desirable to divorce present law from the history out of which such law arose? Fourth what are the ramifications of identifying the law or the source of the law in the ideal? Any student of Melville will recognize at once that all four of these propositions are debated and dramatized throughout his work, and in Mardi, Pierre, and Billy Budd especially.

The legal establishment, led by such men as James Kent, opposed the reforms being pushed by radical Democrats and their liberal associates. Like the members of that other bastion of conservatism, the clergy, orthodox legal philosophers during the first half of the 19th century had buttressed their apologetics with the principles of Scottish Common Sense Realism. Clinging to the philosophical compromises of the Scottish school, they rejected the idealism of both rationalist and transcendentalist extremes. Scottish realism, as one commentator has pointed out,¹⁸ had given Americans the means to be universal while being particular and had shown them the way to avoid the subtleties and "shocking conclusions" of men like Hume and Berkeley.

The Scottish School of Realism, also called the Scottish School

¹⁸Richard J. Peterson, Scottish Common Sense in America, 1768-1850; an evaluation of its influence (Washington: American University, 1963; Ann Arbor: University Microfilms, 1973).

of Common Sense, posited the existence of the extramental world. Further, this existence did not depend upon anyone's apprehension of it. As far as anyone can know, the nature of the extramental world is just what most people would agree that it is. In other words, for all practical purposes it is exactly what common sense tells us it is. The position was most succinctly, if not most soundly, expressed by Samuel Johnson, when---as the story goes---he reacted to David Hume's proposal that the world might not exist at all, by kicking a stone and crying "Thus I refute him." Positing the nature of the extramental world and describing its nature according to the perceptions of common sense allows one to "fall back upon the old furniture of the mind." The approach permits one to avoid the extreme skepticism that says one cannot know at all whether anything exists. It also skirts the danger of having to account for each individual aberration in the perception of this reality. In this manner Scottish realists escaped the pitfalls of Lockean empiricism while at the same time dismissing the ideality and mysticism of neo-Platonism. The philosophy provided a path that was safe for educators and that was available to anyone who could claim to be in touch with common sense.

Those who opposed the codifiers modeled their tactics upon the attacks which realists such as Kames, Reid, and Stewart had successfully launched against the rationalists of the 18th century. Like most educated men of their day, the conservative lawyers had been

made to memorize these arguments as part of a regular course of college training in the late 18th and early 19th centuries. Now, when pressed by opponents who avowedly enlisted rationalism in their cause, the orthodox faithful did not hesitate to throw such prepared rebuttal into the breach, confident of its reception among the educated public.

Proponents of the Common Law attacked the rationalism of the codifiers as a brand of idealism which might be appropriate to pure science, but not to an applied science like the law. In a friendly review of Kent's Commentaries, one writer, who signed himself "E. L. C.," Charlestown, N.H.," began his article with the following concise statement of the argument:

Law has been many times called a practical science. It might also be called an experimental science---for it is always to a certain degree tentative, and may be and often is changed, if its rules are not found to work well when practically applied. . . .

Now it is obvious that a system of arbitrary rules, prospectively enacted by the sovereign authority, could never possess the elasticity essentially necessary for this. A system which should leave the law in the breast of the judge, till the occasion arose on which it should be declared, and then supply the principles of morality, religion and humanity, to the solution of the problem, seems the only one capable of producing such a result. Such a system, the English Common Law may in general terms be affirmed to be. ("E. L. C.," review, pp. 102-103)

The term "arbitrary rules, prospectively enacted by the sovereign authority" applied to a code to be passed by a democratic legislature might be confusing to one who did not know that both sides of the

debate had fallen into the practice of accusing each other of the same faults. The Common Law advocates maintained that purely rational principles were so abstract as to be merely arbitrary with respect to contingencies. Codifiers insisted, however, that such written principles could be formulated and arranged so that "the right mode for determining any particular case should be visible on the face of it," and so be within the grasp of any person of scientific attainments. Codifiers also argued that Common Law practice was arbitrary because of the latitude allowed to the judge's discretion and because of the vast structure of historically evolved forms and procedures which had to be supported when trying a case.

By and large the familiar tone adopted by the legal establishment toward the codifiers was that of a wearied elder forced to deal with sophomoric nonsense. The following comment by Daniel Webster is typical of these condescending dismissals:

It yet appears to us to be among the idlest and weakest theories of the age, that it is possible to provide, beforehand, by positive enactment, and in such manner as to avoid doubts and ambiguities, for all questions to which the variety of human concerns gives rise.¹⁹

Webster made this statement as early as 1818, but, as Perry Miller has pointed out, this thesis would continue to be the principle

¹⁹As quoted in Perry Miller, "The Common Law and Codification in Jacksonian America," pp. 465-66.

argument of the anti-codifiers throughout the controversy.²⁰

It was repeated again in 1831, for example, by Burlington Chauncey Goodrich in an article titled "Codification" which appeared in the Southern Review for August of that year. Goodrich quoted a M. Portalis, an eminent French jurist of the 18th century, who in 1800 was placed on the French committee for the redaction of the Civil Code. According to M. Portalis,

Nothing were more puerile than to take such precautions as would prevent a judge from having anything more to do, than to apply a precise text. To prevent arbitrary judgments, we should expose society to a thousand iniquitous judgments, and what is still worse, we should run a risk of having no justice administered at all; . . . we should make of legislation an immense labyrinth in which reason and memory would be equally lost.²¹

The crux of philosophical debate over codification concerned the sources of ambiguity in man's attempt to translate his experience into a usable body of wisdom for the purpose of creating truth and justice in his world. Those who felt that such wisdom could be codified into easily understood maxims and rules regarded nature

²⁰Perry Miller, The Life of the Mind in America, p. 251.

²¹Burlington Chauncey Goodrich, "Codification," Southern Review, 7, No. 14 (1831), 407.

as an orderly creation, readily apprehended by means of the rational faculty. In Melville's work, Ahab and Pierre are idealists of this sort. Ahab howls "O Nature, and O soul of man! how far beyond all utterance are your linked analogies! not the smallest atom stirs or lives in matter, but has its cunning duplicate in the mind" (Moby-Dick, p. 264). It is part of Melville's irony to suggest that such extreme rationalists are really insane. In Billy Budd he asserted that certain madmen had minds "peculiarly subject to the law of reason".²²

However, characters like Plinlimmon, Franklin, Falsgrave, and the various personas of the Confidence Man reject the notion that wisdom may be codified into rules or that reality is such an easy mystery to solve. Moreover, no matter what one might think of their ethics, these figures are nevertheless portrayed by Melville as being eminently sane men. It is significant also that in the legal controversy, those who opposed the codification scheme emphasized a fundamental inscrutability in reality, for which man must compensate by constantly readjusting and perfecting his wisdom. These anti-codifiers verge at times on the edge of confessing a moral ambiguity about events not unlike that which plagued Melville's peace of mind.

Codifiers argued that Common Law advocates wished to preserve

²²Herman Melville, Billy Budd, Sailor (An Inside Narrative), ed. Hershel Parker and Merton Sealts, Jr. (Chicago and London: The University of Chicago Press, 1962), p. 76.

the ambiguity of the law by leaving it unwritten for the purposes of judicial discretion, a power they equated with the caprices of tyranny. Their opponents replied by maintaining that any attempt to formulate universal maxims or rules of law abstracted from the data of experience would only multiply the sources of ambiguity by replacing reality with a chimera of mere words. Under such conditions, man would be tyrannized by the arbitrary and treacherous nature of language. Pierre, Melville's persona of the philosophical novelist, expressed just these same frustrations with the limitations of language.

Opponents of the codification scheme also criticized the notion that perfect justice was possible here on earth. Codifiers, it must be remembered, were idealists who wished to divorce America from the corruptions of European civilization. Mathews and Bryant, for example, were nationalists who argued for the supremacy of nature and the American experience. If one examines the backgrounds of men like D. D. Field and the Sedgwicks, one finds the Puritan heritage of Stockbridge conspicuous in their upbringing, always a purer variety than that of Boston. Such men were heartily committed to the American dream of re-creating an Eden here on earth. America was a second chance given by God to man for undoing some of the mistakes of the past and starting over again in virgin territory. They actually believed that Americans had a real chance for creating a perfect society. Their opponents reasoned much more sensibly, it would seem,

that Americans had already brought over and established European civilization in America and that furthermore in this temporal, fallen world society would always be imperfect. Absolute morality and perfect justice are standards by which we are guided, but they are always hedged by the contingencies of conflicting interest and the historical evolution of circumstances. At any rate, the confrontation between the two systems of thought are to be found in Melville's Pierre in terms strikingly similar to the formulas quoted above.

In that novel the protagonist creates the worst disaster of inequity, not to mention iniquity, that Melville's satiric humor could devise. The portrayal of the "codifying" Pierre as a Fool of Truth must have come as an unpleasant comment to those in the "Young America" group who were actively campaigning for codification. The active presence of the codifiers in the Duyckinck group may account in part for George Duyckinck's bilious attack on Pierre in the Literary World and for some of the rift that developed between Melville and his former associates among the radical Democrats. With these thoughts in mind, we may proceed with the interpretation of Pierre from the perspective of the codification debate.

Pierre clashes with his mother and Mr. Falsgrave, the family minister, because he wishes to get the clergyman to sanction some abstract principle by which he can resolve his dilemma regarding Isabel. He proceeds under the notion that truth and justice are

absolute ideals which may be formulated and expressed regardless of circumstances. Of course he is prevented from explaining any of the circumstances he has in mind by his mother's presence. He finds that Falsgrave is unwilling to separate moral principles from their temporal contingencies. In a curious echo of Daniel Webster's words quoted above, the minister tells Pierre,

It is not every question, however direct, Mr. Glendinning, which can conscientiously be answered with a yes or no. Millions of circumstances modify all moral questions; so that though conscience may possibly dictate freely in any known special case; yet by one universal maxim, to embrace all moral contingencies,---this is not only impossible, but the attempt, to me, seems foolish.

(Pierre, p. 102)

Melville deliberately connected Falsgrave to the Scottish School by bringing him to the door in the middle of the night "invested in his very becoming student's wrapper of Scotch plaid" (Pierre, p. 163). As a real life figure, Falsgrave would be against codification. He and Mrs. Glendinning have made their decision according to the long-established wisdom of the community. Indeed, if Pierre were to do the same and fall back upon "the old furniture of the mind," as the Scottish School advised, he would cast his lot with the conventional society and marry Lucy Tartan. Instead, Pierre, like the codifiers, throws out or burns all his old things, so that he is left without his past, "untrammelledly his ever-present self" (Pierre, p. 199).

Pierre makes the mistake of thinking that the decisions made by this "common sense" wisdom are purely arbitrary, having grown up

out of the customs and usages of a secular world. The world and its past he takes to be worthless ephemerae, less real and less valuable than ideal principles of an absolute morality. For the realist, however (in philosophical jargon, the "positivist"), such principles have no existence at all without the events and circumstances which form their embodiment.

Further on in Pierre, Melville in his authorial voice advises the reader that man must not get lost in the "hyperborean regions" of truth, because in that "rarified atmosphere" man "entirely loses the directing compass of his mind; for arrived at the Pole, to whose barrenness only it points, there the needle indifferently respects all points of the horizon alike" (Pierre, p. 165). To lose sight of contingency and to devote oneself to principle only is to make the mistake of thinking that man can measure truth by his rational abstractions. The paradox is, as any good writer knows, that the more divorced from concrete detail expression becomes, the more likely it is to be ambiguous and inadequate to describe any situation of real life.

Finally, in Pierre Melville introduces Plotinus Plinlimmon, whose pamphlet "Chronometricals & Horologicals?" is yet another demonstration of the same argument, (Pierre, pp. 210-215) that one's "moral navigation," as one critic has called it,²³ must be with

²³Yvor Winters, "Herman Melville and the Problems of Moral Navigation," in Maule's Curse: Seven Studies in American Obscurantism (New York: New Directions, 1938), pp. 53-89.

reference to both unchanging idealities (the sun and the Greenwich meridian) and to ever-changing present reality (wherever life takes us through time and space). The utility of the unchanging ideal is to help us get our bearings, to tell us where we are. Changing or unchanging, such points are not arbitrary at all, but for each man necessary elements of his existence. Whatever form the local particulars may have taken, it is certain that these contingencies do exist and that they do have some form, some undeniable reality which must be met and dealt with by one who makes a moral decision. Plinlimmon would deny that one might make ethical decisions with respect to unchanging, absolute, i. e., "codified," principles alone.

Melville introduces more irony into Pierre's relationship with the pamphlet. The pamphlet itself is a "codification" of Plinlimmon's philosophy, which his disciples made without his consent. In this "codified" form, Plinlimmon's theory is incomprehensible to Pierre. Without concrete experience the wisdom is beyond his understanding. Pierre himself is sophomoric in his rejection of experience as a guide to conduct. The philosopher Plinlimmon does not take credit for the pamphlet, which is a distortion of what he really said or meant. Plinlimmon himself is inscrutable and seems to have his own dispensations; i. e., he scorns the idea that he might be bound by rigid, fixed principles. The implication is that whatever his philosophy may be, one cannot write it down into a set of rules.

Plinlimmon and Falsgrave have much the same message for the

young Pierre. Both have a system for ethical decision identical to that of the anti-codifiers in Melville's day. There are others among Melville's characters who think likewise. Falsgrave shows his kinship to them by his brooch. As the minister delivers his sermon on moral contingency to Pierre, his napkin drops, dramatically revealing the pin, which depicts the union of the serpent and the dove (Pierre, p. 102). The connection with figures in later works becomes apparent as Melville characterizes Benjamin Franklin in Israel Potter by establishing his likeness to the patriarch Jacob and to Hobbes of Malmesbury. Of Jacob he says:

The history of the patriarch Jacob is interesting not less for the unselfish devotion which we are bound to ascribe to him, than from the deep worldly wisdom and polished Italian tact, gleaming under an air of Arcadian unaffectedness. The diplomatist and the shepherd are blended; a union not without warrant; the apostolic serpent and dove. A tanned Machiavelli in tents.²⁴

The patriarch Jacob kept his faith with the inscrutable purposes of God. At the same time he accepted the world on its own terms. He combined the guile belonging to a knowledge of good and evil with the heavenly wisdom brought by the dove descending. Melville's use of this figure would indicate a belief on his part that both kinds of wisdom are necessary to a successful life. One may have the heavenly

²⁴Herman Melville, Israel Potter: His Fifty Years of Exile, vol. IX, The Works of Herman Melville (London: Constable and Co., 1923), p. 59.

wisdom, like the old man in the last scene of the Confidence-Man, yet lack the deep worldly wisdom to save oneself from ruin. One may have the worldly wisdom, like so many of the passengers on board the Fidele, yet lack the heavenly wisdom to avoid the pitfalls of purely selfish interest. The best decisions are made, according to these Melvillean characters, by reference to both principle and immediate contingency. This is the argument of the anti-codifiers. They maintained that judicial decision by reference to a code of principles alone would likely result in miscarriages of justice. It were better that these principles were left immanent in the great body of precedents to be extracted and at the same time modified for each particular case by a learned judge. Franklin himself, as Melville sees him, spent his life making himself acquainted with both kinds of wisdom, heavenly and earthly, ideal and real. Melville remarked of the sage, "It was a goodly sight to see this serene, cool and ripe old philosopher, who by sharp inquisition of the man in the street, and then long meditating upon him, surrounded by those queer old instruments, charts and books, had at last grown so wondrous wise" (Israel Potter, p. 50). Pointing ahead to the many guises in which he presents the confidence man, Melville notes that Franklin, "having carefully weighed the world, . . . could act any part in it" (Israel Potter, pp. 61-62).

These characters have in common the same metaphysical stance. They see reality as being made up of two orders, one infinite, ab-

strait, ideal, and the other finite, imperfect inasmuch as it is modified by contingencies. He who would move with serenity and success through life must be able to distinguish the two orders and keep each in its proper place.

Good and evil by Falsgrave's and Plinlimmon's lights are too tangled for Pierre in "fleshly alliances". Yet Pierre himself is in trouble throughout the novel precisely because he denies his own fleshly alliances, refusing to recognize them at all, until it becomes too late to make use of the perception of his error. In trying to equate the ideal with the real, Pierre succeeds only in living in a land of shadows until the phenomenal reality he has let out of his control overtakes and crushes him.

We now have the answer to our first question. Judging from the evidence of Pierre, it would seem that Melville thinks it neither possible nor desirable to attempt to lay down universal maxims, no matter how rational, which could determine ethical decisions in all possible cases. This conclusion brings us to our second question: does ambiguity result when ideal abstractions are used as a guide without first considering the concrete realities out of which these arose?

Melville, like Common Law advocates and other legal positivists, demonstrates that once truth is divorced from the phenomenal world, ambiguity begins. Words, according to Mardi, are as empty and meaningless as algebraic signs, which may stand for whatever one pleases.

Yet the ambiguity possible to words may be of so many kinds that perhaps it is best for the purposes of discussion to limit ourselves to sources of ambiguity rather than the ambiguities themselves.

One may lay it down as a ground rule of the problems with which Melville presents his readers that one may not dispense with "visable [sic] things," "undoubted deeds," or "living acts". Ultimate truth is never available to man, but his truest path is one which keeps him in contact with the real extra-mental world. In this respect one may say that Melville's metaphysics were in agreement with those of the Scottish realists and of their descendants in the modern school of legal positivists.

In Mardi Melville demonstrated frequently the predicament of those who are cut off from empirical reality testing. Donjalolo is confined to the groves of Willamilla where he is reduced to using the eyes and ears of others if he wishes to know the world. He is presented with contradictory descriptions of the coral reef. It is interesting to note that the evidence per se in this episode is not mutually exclusive, but the hypotheses which this evidence was supposed to support were. As it turned out the most nearly correct synthesis was that the reef was neither all red nor all white, but red and white in different locations. The abstraction needed to be revised on the basis of the evidence available. But the perception was only available to Babbalanja who had seen the whole reef (Mardi, p. 250).

In Babbalanja's story of the nine blind men who set out to see the world, each found a stem of a many-trunked tree, stood by it, refused to heed each other's plea to examine further evidence, and so entertained hypotheses manifestly incorrect to any who could see all the trunks at once (Mardi, pp. 355-57). Again, the evidence per se was not wrong, but the ideas based upon imperfect apprehension of the evidence were erroneous. The ideas had to be revised. First, there was no one trunk for the banyan tree. This idea was a false categorization for the situation. Second, acceptance of all real evidence is the first necessary step to forming correct ideas. Third, ideas are always imperfect summaries or categorizations of reality and so should be kept open to amendment.

Again, in Mardi, two servitors of King Media dispute over a fossil track they find on the ground, "tri-toed footprints of some huge heron". One maintains that they are three toes, the other that it is one foot. Babbalanja tells them they are both right if they unite, both wrong if they divide. Media, however, dismisses them impatiently, saying, "Away, ye foolish disputants! . . . Full before you is the thing disputed" (Mardi, p. 416). Words or ideas can be but partial or misleading categorizations. They are never to be mistaken for the thing itself.

The theme is continued in Mardi on the isle of Maramma. The guide there is blind Pani who holds all manner of principles to be true even if they are flatly contradicted by sensual evidence. Pani

relies upon authority and does not dare explore beyond settled creeds. Later, Maramma is contrasted with Serenia. Maramma is called the place where Alma's precepts are preserved (Mardi, p. 625), but Serenia is the place where piety, or strict attention to the example of Alma is the ruling principle from which all else follows, precepts then included. The precepts of Alma are constantly illuminated by Alma's life: "For every precept that he spoke, he did ten thousand mercies. And Alma is our loved example" (Mardi, p. 629).

Ahab is another "codifier," or abstract idealist. His madness prompted him to lose sight of the whale as a whale. He refused to accept Moby Dick for what Starbuck says he is, "a poor, dumb brute" (Moby-Dick, p. 144) who out of instinctual self-preservation merely struck back when endangered. Ahab set up an ideality, an abstraction as the highest and final reality. He pursued malice. He and the rest of the crew, Ishmael included, believed in the spirit of demonism in the world. Ahab did not care if the white whale were principal or agent, he would destroy him because he believed that way he could strike at the abstraction which he was sure existed somewhere somehow. Melville implies that we are all liable to this madness if we cut ourselves off from the means for testing reality. In the chapter "The Whiteness of the Whale" it is the "man of untutored ideality," the "unread, unsophisticated Protestant of the Middle American States," the "untraveller American" who are most susceptible to credulous fancies (Moby-Dick, p. 167). It is the

wretched infidel who refuses to believe in the reality of the color in the universe who must then gaze himself blind at a monumental white shroud, and seek to fill the void with ungraspable delusions. To believe that Nature paints the harlot, to reject the evidence of the senses as real, is to devote oneself to dangerous and unnecessary ambiguity, if not madness.

The outstanding feature of the Confidence-Man is the total lack of any means whereby to test reality. The novel may be read as an extended demonstration of what happens to people who act on logical principle alone. Both the victims of the confidence game and the reader are prevented from knowing by any concrete evidence whether what is said is true or not. Ratiocination without the evidence is tortuous, ambiguous, and futile. Part of the seduction of the game is in getting the passengers to set aside both past experience and present lack of evidence and to make commitments merely on the basis of argumentation, or principle. One might note too that the Counterfeit Detector in the last scenes of the book is little more than a codified guide for judging bank notes. The innocent old man who attempts to use the Detector finds his task impossible without the experience and judgment necessary to make his decision.²⁵ In any case in the Confidence-Man the victim, and the reader as well, is prevented from actually knowing the truth. It is possible that he

²⁵ Herman Melville, The Confidence-Man: His Masquerade, ed. Hershel Parker (New York: W. W. Norton & Company, Inc., 1971), pp. 212-17.

is simply left to believe what he will.

In Pierre Melville demonstrates the warning of the anti-codifiers: ambiguity results when principles are divorced from experience. Pierre is warned both by Falsgrave and by Plinlimmon's pamphlet against setting up universal maxims or perfect ideals in this world. That way lies not only unreality, but, as Pierre finds out, devilish ambiguity as well. Pierre's problem was outlined by Burlington Chauncey Goodrich, a disputant in the codification controversy, when he wrote in 1831:

The question arising upon [written law] is not what is reasonable, but what is commanded. . . . The business of an interpreter is that of a grammarian and a philologist. . . . In the case of a single statute it is almost impossible to come to any satisfactory conclusion---because it may be absolutely impossible to derive any assistance from general reasoning on the analogies and policies of the law. . . . When a principle of the Common Law is ascertained, it may be fearlessly pushed out to all its consequences---but in a statute, a subsequent provision may come in conflict with a prior, because the legislator did not see, or did not choose to adopt, the true theory in its whole extent the common law. . . is the application of common sense, disciplined and directed by certain established principles, to the affairs of men. (Goodrich, p. 403)

Pierre has his commandments (honor thy father and mother; love ye one another; comfort the poor, etc.), but he would not accept the whole context within which such precepts are actually practiced, or out of which they had arisen. He did not choose, that is, to "adopt the true theory in its whole extent". Rather he committed himself

to absolute ideals which might have been perfect as rational abstractions, yet were imperfect for making practical decisions in the real world.

The first thing that happens to Pierre therefore is that his subsequent provisions conflict with his prior. He resolves to own Isabel to the world as his sister, but finds then he cannot do that without wounding his mother and dishonoring his father. He wishes to take Isabel as his wife but cannot do that without disowning her as his sister. He cannot honor his vows to Lucy unless he disowns Isabel as his wife. He cannot elevate Isabel or Delly as he thinks right because to have to do with them at all means renouncing the wealth and position by which he could help them. Pierre fragments the fabric of society with its customs and usages. Society determines relationships by reference to real situations and to the real fleshly alliances which Pierre despises. By abstracting ideal, pure principles out of the body of wisdom he has inherited, both religious and secular, he brings such commandments into hopeless ambiguity and conflict, and illustrates the most dire predictions of the anti-codification faction.

Eventually Pierre finds himself reduced to a "grammarian and a philologist". This was the fate that the anti-codifiers---Goodrich, as quoted above---threatened was in store for anyone who adopted Pierre's course of divorcing morality from contingency and concrete details. Pierre and Isabel become aware of the predicament they are

in after they have made chimeras out of their most sacred, secular relationships:

"Thou, Pierre, speakest of Virtue and Vice; life-secluded Isabel knows neither the one nor the other, but by hearsay. What are they in their real selves, Pierre? Tell me first what is Virtue:--- begin!

"If on that point the gods are dumb, shall a pigmy speak? Ask the air!"

"Then Virtue is nothing."

"Not that!"

"Then Vice?"

"Look: a nothing is the substance, it casts one shadow one way, and another the other way; and these two shadows cast from one nothing; these it seems to me, are Virtue and Vice." (Pierre, p. 274)

Virtue and Vice become mere names by this point to Pierre, as were other principles, the relationships of mother, sister, wife, for example. Millthorpe was a lawyer without a law practice; Pierre an author without having written anything.

According to the anti-codifiers, and as we have seen, in line with the thoughts Melville had expressed previously in Mardi, laws might not be at variance with rational ordering or right-reason, yet the rational characteristic is only a corollary of harmony in the universe, never a complete statement of the Original Principle. Rationality is an aspect of the universe not to be confused with its essence. On these grounds, anti-codifiers maintained that the rationality of morality and law was a false issue and an erroneous attempt to substitute a descriptive method for the thing itself, much in the way that one might mistake the name of something or its defini-

tion for the thing itself.

This position had two important implications, both of which are taken up by Melville as philosophical novelist and by the legal debaters of the codification struggle. The first, which we have just finished discussing, is the inevitable confusion which must occur when the judge has only empty words to fall back upon and lacks their qualification in concrete reality. The second implication is the subject of the third question: is it desirable to divorce present law or present means of determining law from the history out of which such law arose?

David Dudley Field's codification efforts encountered the historical school of jurisprudence in the full tide of its strength. Although the chief apostle of the historical school, Savigny, influenced the English-speaking world primarily after his death, nevertheless, by 1846 many precepts of his thinking had been used by American Common Law advocates in writings published against procedural reform. The cautious tone of these writings disappeared after this school of thought became firmly entrenched as the new establishment, for the most part after 1850. One of Savigny's most ardent disciples in this country was James Coolidge Carter, an arch opponent of codification, who locked horns with Field when agitation was renewed in the 1870's.

Common Law advocates pointed to the historical growth of the Common Law and to evidence that it was still growing as features of priceless virtue. Man's wisdom, they said, is imperfect and must re-

main so until the end of time. Only time itself will prove what is correct and what is not correct in our deductions, and only time can add to the structure that which is not yet known. The Common Law was flexible to meet the demands of change, to grow as man and society grows. Codification, they argued, whenever it occurred, would freeze the law and its wisdom at whatever high watermark it had thus far obtained.

Codifiers argued, on the other hand, that since the laws of God and nature were immutable, absolute, and available to man's rational faculty, there could be no objection to stating those laws once and for all, making them thus inaccessible to the vagaries of politics and the caprices of the judge's discretion. They also contended that some of the "wisdom" embodied in precedent and the rule of stare decisis²⁶ was patently absurd and inapplicable to modern conditions, a result of situations extant in the past or in foreign society. Americans, they declared, had no need to preserve such flotsam and jetsam of history.

Their opponents rebutted these arguments by recognizing the existence of useless or nonsensical precedents but declaring these

²⁶ stare decisis---Law Latin which is translated "to abide by, or adhere to, decided cases." When a point of law has been settled by decision, it becomes a precedent which judges are not to depart from except in cases where a rule of law has been clearly misinterpreted, or,---often the case in modern times---where changed conditions significantly alter the way in which the principles of law must be applied. The intent of the maxim "stare decisis" is to deter judges from altering the law merely according to their individual sentiments.

exceptions which time would take care of if the judge were given the license to interpret the body of the law as a whole in comparison with new situations. In this way he could arrive at the best compromise between progress and the wisdom of the past. Thus they converted the objection to judicial discretion into an advantage. They maintained, moreover, that a code would be nothing more than an unapproachable, monumental body of precedent uncontrollably regulating the future by the standards of wisdom erected in the 19th century. Every flaw in the code would remain inexorably operative until public referendum or the legislature could be prevailed upon to amend it.

When Joseph Story made his inaugural address at the Harvard Law School in August, 1829, he extolled the law, and the Common Law in particular, in the following terms:

. . . law is a science, which must be gradually formed by the successive efforts of many minds in many ages; . . . its rudiments sink deep into remote antiquity, and branch wider and wider with each new generation; . . . it seeks to measure the future by approximations to certainty, derived solely from experience of the past; . . . it must forever be in a state of progress, or change, to adapt itself to the exigencies and changes of society; . . . even when the old foundations remain firm, the shifting channels of business must often leave their wonted beds deserted, and require new and broader substructions, to accommodate and support new interests.²⁷

²⁷ Joseph Story, Inaugural Address at Harvard Law School, 1829, as quoted in John R. Strong, Remarks upon the Codification Controversy in the State of New York (New York: Henry Bessey, printer, 1883), p. 3.

Perry Miller has said of this famous oration that it was "for decades regarded as the supreme, the final, the victorious statement within the profession of . . . the 'orthodox' conception of its function".²⁸ Small wonder then that in 1845 when codification and legal reform once more threatened established legal opinion that Rufus Choate should have echoed and amplified Story's statements in another address at Cambridge.

Choate's speech justifies his reputation as a powerful orator. Readers of Melville might note that the metaphors Choate chose are interesting not just for the idea they contain, but for their resemblance to images invoked in Mardi and Moby-Dick. The following is one such excerpt:

---what is that law? Mainly a body of digested rules and processes and forms, bequeathed by what is for us the old past time, not of one age, but all the ages of the past,---a vast and multifarious aggregate, some of which you trace above the pyramids, above the flood, the inspired wisdom of the primeval East. . . . In the way in which it comes down to us, it seems one mighty and continuous stream of experience and reason, accumulated, ancestral, widening and deepening and washing itself clear as it runs on, the grand agent of civilization, the builder of a thousand cities, the guardian angel of a hundred generations, our own hereditary laws. . . . But to have lived for ages, . . . not swathed in gums and spices and enshrined in chambers of pyramids, but through ages of unceasing contact and sharp trial. . . .

²⁸The Legal Mind in America: From Independence to the Civil War, ed. Perry Miller (1962; rptd. Ithaca, N. Y.: Cornell University Press, 1969), p. 176.

and here Choate begins to magnify his vision:

. . . to have lived through the drums and trappings of conquests, through revolution, reform, through cycles of opinion running their round; to have lived under many diverse systems of policy, and have survived the many transmigrations from one to another; to have attended the general progress of the race, and shared in its successive ameliorations,---thus to have gathered upon itself the approbation or the sentiments and reason of all civilization and all humanity, . . .²⁹

Beginning in Mardi, Melville develops the idea that man's wisdom can never be perfect, and that only time can give us understanding. In the chapter "Time and Temples," he says that nothing was ever built in a day, and that all grand edifices are built upon the past and with the materials of the past. Time, he tells us, "is the mightiest mason of all" (Mardi, p. 230). In Moby-Dick he enlarges this thought by adding that "small erections may be finished by their first architects; grand ones, true ones, ever leave the cope-stone to posterity," concluding with the prayer "God keep me from ever completing anything" (Moby-Dick, p. 179).

Time is praised in Mardi because, among other things, it "enriches and enlightens the mind," "of fables distills truth" (Mardi, pp. 270-71). Although all beginnings are stiff, he tells us, "we are lucky living midway in eternity" (Mardi, p. 393). Time enlightens

²⁹From Rufus Choate, The Position and Functions of The American Bar, As An Element of Conservatism in the State: An Address Delivered before the Law School in Cambridge, July 3, 1845, reprinted in The Legal Mind in America, pp. 256-66.

because much of what man does in the present, he does unconsciously. He does not know the meaning of his actions until they are long past; the present is always acted out by men who are part somnabulistic, part lunatic. Melville concludes in Mardi that "much of the wisdom here below lies in a state of transition" (Mardi, p. 459), but that by studying the past, man may gain much understanding:

Throughout all eternity, the parts of the past are but parts of the future reversed. . . . And not more infallible than the ponderings of the Calculating Machine than the deductions from the decimals of history. (Mardi, p. 527)

"The past," said Melville, "is a prophet. Be the future its prophecy fulfilled" (Mardi, p. 520).

In the political section of Mardi, the radicals of the young republic are chided by the mysterious scroll for discarding the lessons of history. The author of the scroll ("a voice from the gods") admonishes that "while all Mardi's Present has grown out of its Past, it is becoming obsolete to refer to what has been" (Mardi, p. 525). He portrays the rash youths tearing up the scroll and calling its author a fool ("Does he not know that all the Past and its graves are being dug over?" Mardi, p. 530).

Choate used an extended metaphor in the speech quoted above which presented law as the wisdom of the ages, derived from the living deeds and thoughts of men. He characterized this wisdom as "accumulated," "hereditary," "one mighty and continuous stream" pouring

down through time, finding its release into the present through those who reverence and preserve the past. Melville expresses a similar notion in Mardi with the difference that he does not externalize such wisdom into the law, but leaves it mystically immanent in the social, historical dimension of human existence. He declares that he was present at the flood, at the taking of Tyre, the downfall of Gomorrah, in Solomon's court, etc. (Mardi, p. 297). He proposes that many, many, souls are in him (Mardi, p. 368). To complete the similarity with Choate's metaphor, and ultimately with that of Story nearly two decades earlier, he finishes with the image:

And as the great Mississippi musters his watery nations;
Ohio, with all his leagued streams; Missouri, bringing
down in torrents the clans from the highlands; Arkansas,
his Tartar rivers from the plain;---so, with all the
past and present pouring in me, I roll down my billow
from afar. (Mardi, p. 368)

In Moby-Dick he suggests that in each of us there lies buried a past which holds the secret of the present:

. . . far beneath the fantastic towers of man's upper earth, his root of grandeur, his whole and awful essence sits in bearded state; an antique buried beneath antiquities, and throned on torsos! . . . So like a Carytid he patient sits, upholding on his frozen brow the piled entablatures of ages. Wind ye down there, ye prouder, sadder souls! question that proud sad king! A family likeness! ay, he did beget ye, ye young exiled royalties; and from your grim sire only will the old State-secret come. (Moby-Dick, p. 161)

Man can discard the past only under the penalty of ignorance and blindness in contemporary actions. Without his past he lacks the clue to the present. Left to his own "untrammelled, ever-present self" (Pierre, p. 199), man has only his lunatic-like apprehensions and desires to fall back upon; his decisions will remain unproven by ongoing experience until it is too late to save him from folly. The present is a masquerade produced by our limited perspectives.

Lest one think, however, that Melville did not qualify the efficacy of time, it is well to point out that wisdom was not merely a matter of learning history, but like "geometric lines" (i. e., parallel lines) they may pierce infinity but never meet (Mardi, p. 554). The wise man must learn to separate the chaff from the grain; history but gives him the added advantage of an extended perspective.

As he composed Moby-Dick Melville registered his own opinion of a slavish devotion to precedents. In "The Funeral" he tells of ships mistaking the unharmed corpse of a whale for rocks and shoals, remarking,

And for years afterward, perhaps, ships shun the place leaping over it as silly sheep over a vacuum, because their leader leaped there when a stick was held. There's your law of precedents; there's your utility of traditions; there's the story of your obstinate survival of old beliefs never bottomed on the earth, and now not even hovering in the air! There's orthodoxy! (Moby-Dick, p. 262)

Precedents may be guides, but not dictators to the future. The past

must always be checked and rechecked against present reality.

Freezing the wisdom of any one time into an eternal fixed code only makes a monumental precedent out of the whole law.

Like his contemporary Charles Dickens, Melville poked fun at some of the logical nonsense in the law. He burlesques the weighty authority of the commentators in Moby-Dick's "Heads or Tails" (the title of the chapter itself refers to the arbitrary nature of the advice). In this digression he discusses the case of some poor fishermen deprived of their whale by an agent of the Duke:

It will be readily seen that in this case the alleged right of the Duke to the whale was a delegated one from the sovereign. We must needs inquire then on what principle the sovereign is originally invested with that right. The law itself has already been set forth. But Plowdon gives us the reason for it. Says Plowdon, the whale so caught belongs to the King and Queen "because of its superior excellence." And by the soundest commentators this has always been held a cogent argument in such matters. . . .

And thus there is a reason in all things, even in law. (Moby-Dick, p. 336)

In the chapter preceding, "Fast Fish and Loose Fish," he likewise ridiculed legal practice in setting up definitions.

For the purposes of our study Melville's attitude toward precedent, or "orthodoxy" as he styles it, involving as it does a certain concept of time and change, is the most important of the above. In the incipient naturalism of this pre-Darwinian era, men of all walks of life had learned that the cosmos was not static. The spontaneous creation seemed now not ever to have existed; the

world had grown through time to be the way it was at present and would continue to grow and evolve through all time. Such perceptions demanded historicity and spelled the doom of Platonic stasis with all its corollaries. Change had been palpably demonstrated as a condition of the universe. It was no longer feasible to maintain, as it had been under the comfortable cosmology of the Old Testament world or even under the rationalist cosmology of medieval Christianity, that there was "nothing new under the sun".

In general, Melville accepts the historical dimension as a necessary adjunct of the search for truth. He was disposed to satirize Benthamite theory because it gave little weight to historicity, although he was inclined, on the other hand to agree with both Carlyle and Bentham that man cannot be contained completely by the institutions of the society in which he finds himself. Melville implies in his stories that to divorce oneself entirely from the past and to attempt to set up pure and rational ideals by which the ethical decisions of ordinary life must be governed are paths likely to lead one into fantasy, delusion, nightmare, and insanity. Man in his "untrammelled, ever-present self" is an outcast from society, because society is a web of historically developed restriction. Without his social context he is an Ishmael condemned to wander the wilderness of a chaotic present, like Pierre, courting privation and death. And, like Pierre, he will eventually fulfill the scriptural prophecy concerning Ishmael, that his hand shall be lifted against

every man. The implications of these conclusions for Melville's existentialism are clear. Man cannot avoid the existential element of his being. To reject it fully---as rational idealists would do---is to cut oneself off from reality. But man cannot live in the present alone. He must accept the historical dimension of experience and his ability to interpret ongoing experience by reference to the lessons of the past.

Finally there remains the fourth question: what is the nature of the fundamental problem in equating law with an ideal such as the law of nature? In the introduction to his modern translation of Kant's Metaphysical Elements of Justice, John Ladd offers the following formulation:

Every political philosophy must, sooner or later, come to grips with the issue of the relationship between the actual and the ideal in government and law. Should our allegiance be to what is actual or to what is ideal? Is the law defined by what is actual or by what is ideal?

Having posed the question thusly, Ladd goes on to offer the following estimate of the problems involved in reaching a solution:

. . . . The natural law tradition. . . analyzes government and law by reference to the ideal. It maintains that law is part of morals. This has led to the frequent accusation that it utterly confuses crucial political issues by identifying law (and government) as it is with law (and government) as it ought to be. Legal positivists, who are the most ardent opponents of the natural-law theory, are quick to point out that the practical effect of identifying law with a part of morals is either to nullify existing law in favor of an ideal law or to elevate all existing law to the

status of what is moral; in other words, the natural law theorist, they maintain, has to be either a radical revolutionary or an unregenerate reactionary.³⁰

Ladd's explanation is a fairly adequate description of the horns of dilemma Melville set up in Pierre, Bartleby, and Billy Budd. The critics of Billy Budd in particular have often fallen out on one or the other of these extremes. Phil Withim's "Billy Budd: Testament of Resistance," (1959)³¹ presents a convenient survey of the literature published in the "acceptance or resistance" controversy surrounding Melville's last work. Ever since 1933 when E. L. G. Watson published his now famous article, "Melville's Testament of Acceptance,"³² debate has raged over whether Melville's story of the Handsome Sailor was the Nunc Dimittis of one who had remained a "radical revolutionary" throughout his life or of one who had bowed in his last years to a reactionary philosophy.

Melville makes it easy for his reader to assume that natural law, despite its impracticality, has an intrinsic moral superiority over martial law. He baits the trap with the portrait of Billy as an extremely attractive specimen of the "noble savage" or the Handsome

³⁰ John Ladd, "Introduction," The Metaphysical Elements of Justice by Immanuel Kant, ed. John Ladd (New York: The Bobbs-Merrill Company, 1965), pp. xviii-xxix.

³¹ Phil Withim, "Billy Budd: Testament of Resistance," Modern Language Quarterly, 20 (1959), 115-27.

³² E. L. Grant Watson, "Melville's Testament of Acceptance," New England Quarterly, 6 (1933), 319-27.

Sailor. The scene in which Billy takes leave of the Rights of Man is redolent with temptation to color it with the spirit of '76. The recruiting officer falls prey to the enticement, but the narrator immediately comments "more likely, if satire it was in effect, it was hardly so by intention" (Billy Budd, p. 49). Melville's deliberate contrast of the beautiful barbarian with the pallid, over-civilized, intellectual Claggart again provokes the reader to make an invidious comparison between the "natural" and the civilized. Yet Billy is not man existing in a state of nature; he is in fact a social being with a narrowly defined berth in the social structure. His position becomes even more narrowly and rigidly defined when he is transferred from the merchant service to the King's navy. Billy, more than the reader, it would seem, is perfectly aware of his social obligations and totally comfortable within them, as may be witnessed by his cheerful acquiescence in the impressment, his desire to get along with his fellows and avoid the censure of his superior officers, and by his reaction to a proposal of mutiny by a man not in his proper place on the ship.

When Melville was writing Billy Budd controversy over the validity of natural law had been revived during the second era of struggle to codify the Common Law. By this time there were two versions of "natural law," one a Platonic ideal held by many of the older members of the legal establishment (and, of course, by the clergy), the other a product of advancing science and Darwinian biology. The

natural law referred to in Billy Budd is the older version. It made its last salient appearance, apart from religious quarrels, in the law reform debate in the United States and the British Empire during the 1870's. After that "natural law" generally meant "naturalism" with its notions of the survival of the fittest, the law of averages. As we have seen, Melville himself did not accept the idealist's concept of natural law. It seems only logical to conclude, therefore, that one ought to approach with extreme caution his portrait of Billy as ideal, natural man.

Today faith in idealistic natural law seems a quaint indulgence permitted to antiquarians and readers of romantic literature. On the other hand, Melville must have been aware that his contemporaries needed but little encouragement to see Billy as a creature properly governed by ideal natural law. All our experience with Melville's work, however, should tell us that to judge mankind so would be to act the part of a sophomoric fool or an irresponsible maniac, capable of causing, like Pierre or Ahab, irreparable mischief.

Captain Vere's idea of the sailors on board the Bellipotent is Hobbesean. He believes that their natural inclination is to revolt. They are restrained, Vere surmises, only by a web of order thrown over them like a loose-fitting garment. Vere is not a rational idealist. Like the anti-codifiers he believes in tempering principle with contingency. To Vere the code embodied in the martial law and the Articles of War should be flexibly applied. He may be aware that the

laws say that he ought to hold Budd for trial on board the flag ship; yet the emergency he perceives in the situation makes him adjust the principle for the particular case, and he is glad that the usages of the sea permit him to do so. At the same time, his decision would seem to abrogate Billy's rights under natural law.

The ideas of "constitutional rights" and "inalienable rights" carry with them the notion that all manmade laws must take their limitation from God, or from the rules of natural law as declared in 1776 and "codified" in the Constitution of the United States. The problem Melville dramatized in Billy Budd remains a fundamental problem of American political thinking: the conflict between a standard of ideal perfection in natural law and the exigency of the passing hour. Our history is studded with the trials of this question. In Melville's lifetime the slavery issue, turning as it did upon this very point, was first brought to a head in the Fugitive Slave trials of the 1840's and 1850's, over which Judge Lemuel Shaw presided. Ultimately the issue was re-tried on the field of battle; suffered, that is, a trial by combat.

The trap in Billy Budd is to assume first that natural law or divine justice is the standard by which the case must be judged. To make this assumption is to conclude on the one hand that the martial law upheld by Vere and his drumhead court is bad law because it conflicts with ideal, perfect justice. This conclusion leads one to rebellion on the ground that bad law ought not to be obeyed. On

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the other hand, it is also possible, as John Ladd suggests, to assume that the martial law is an ideal with final value in itself, sanctioning therefore extreme sacrifice for its sake. Watson, for example, calls Billy Budd Melville's "testament of acceptance" on the ground that imperfect as martial law or any bad law might be, it alone is able to maintain the order which guarantees all other rights available to mankind. Such reasoning justifies the other face of the legal idealist, the unregenerate reactionary.

Captain Vere, however, does not equate law with the ideal; nor does he see the ideal as the source of the law. He tells his court "for us here, acting not as casuists or moralists, it is a case practical, and under martial law practically to be dealt with." He also advises the court that whatever construction they wish to place upon the matter between Claggart and Billy, it must remain a mystery, "a matter for psychologic theologians to discuss," for the court may concern itself with the prisoner's deed alone.

Melville in his narrative voice does not equate law with morals. He goes out of his way to separate the two, especially regarding the prudence with respect to external acts practiced by good and bad alike. Claggart's careful observance of forms is likewise reminiscent of Ahab's care to avoid a charge of usurpation. In Mardi, a distinction between legality and morality is made explicitly in the opening chapters. The same is either implied or stated throughout Melville's works from the missionary atrocities of Omoo to the alternative

methods of dealing with Bartleby.

If rooting the source of the law in the ideal is an improper approach, it is appropriate then to inquire for the alternatives. The obvious option is to receive law as rooted in the social context; i.e., as an expression of custom and usage with an historical dimension which allows for a certain flexibility relative to present needs. The judge has the responsibility of doing whatever is necessary to promote the general welfare within a framework of existing laws, based upon his estimate of the demands of the situation.

Vere lists the demands of the situation: Budd has struck and killed a superior officer in time of war aboard a military vessel. The sailors will expect that he will receive the traditional, prescribed punishment; and if he does not, they will take the opportunity to revolt, bringing chaos into the military establishment. Nevertheless, the implications, as no critics care to remember, are that if the emergency did not exist in the light of the aftermath of the Nore mutiny, then Budd might be dealt with in a less severe fashion. If the situation had permitted, he might have been "let off" with a considerably mitigated sentence carried out by a regular court martial on shore or aboard the flag ship at a later date. It was the situation, however, not the letter of the law, which controlled the outcome of Vere's decision and subsequent behavior.

Each of Vere's minor decisions throughout the novella are also controlled by his estimate of the situation. His arranging a meeting

between Budd and Claggart in his chambers, as it were, to see if the matter could not be settled out of court is determined solely by his wish to avoid public notice of the quarrel. The summary handling of the execution and the burial is similarly performed with a view to the dangers of the situation. Budd's original impressment from the merchant ship is justified for Vere, as well as for the recruiting officer, by another situation, the necessity of manning the King's navy.

Vere's value judgments are explicit: chaos is bad and not wanted, forms are his lifelong commitment. Order was a paramount value. Vere is a legalist whose sentiments might be compared to those of Kent's reviewer (*supra*) who said that there were cases in which it did not matter what the law was, so long as the law was fixed. Vere opts, therefore, for a government of law and order. It is interesting to note that he invokes the warrant of the "people" for this view of the matter. The ship's "people" will think something is amiss if Budd is not dealt with according to the Articles of War read over their heads daily. They will assume that if their superiors suddenly have the right to abrogate the law, then they may do so too.

It is true that all these "reasons" are merely Vere's speculations. Yet like any good judge he must make such estimates of the probable consequences of the court's decisions if he is to fulfill his social duty as well as his judicial function. There are times

when the justice immanent in the long-range political consequences, and not the justice of a particular case, must be the primary consideration.

The reader, therefore, might see himself in the position of the three worthy soldiers who sit as Budd's trial court. Their impulse, like that of the reader (Melville has set us all up) is to judge Budd by natural law. Vere lectures them, and the reader at the same time, admonishing them that the true nature of their obligation is to society, not to ideals or to their compassion for any private individual independent of his relationship to society. Budd has not simply killed a man impulsively and unintendingly; he has committed a breach of martial discipline unforgivable in the situation. Vere's summary, which amounts to a judge's charge to the jury, is a description of the societal nature of Budd's act; and it is, after all, as a society that the readers or the members of the court have any right to judge him at all. Thus law, if it is to have any practical meaning, must be taken in its social context, which includes an historical as well as an immediate dimension. For this context, and not a set of disembodied ideals, is the source and the authority of the law.

Melville's emphasis on the necessity for community has been noticed in other contexts.³³ In the next and final chapter, we shall

³³See for example Alice P. Kenney, The Gansevoorts of Albany. . . (Syracuse: Syracuse University Press, 1969), pp. 214-228.

explore the possibility that his observation of Lemuel Shaw's long and painful career on the bench during the pre-Civil War decades might be a source for some of his thinking about the relationship of the individual to the society which defines his ethical obligations.

* * *

Conclusion:

The codification scheme was part of an overall campaign for law reform mounted by the radical Democrats. Its concepts were complex and difficult to understand, though fundamental to the political philosophy of American life. For the most part this vital political battle was chiefly known to the lawyers and jurists who took part in it. Codification of the law was not a topic generally discussed by the public at large, nor did it enter into the body of information that became disseminated as the popular legal science of the day.

Though the subject belonged to the more arcane matters discussed by lawyers and though the issues were difficult to grasp, it does not seem unreasonable to assume that Melville was versed in the roots of the problem. It was his avowed purpose to become a "philosophical novelist". Moreover, many of the most prominent codifiers were among his congenial acquaintances. It is not at all unlikely that Melville was stimulated by the activities of these men or that he chose to dramatize the concepts and differing sides of the issue in his stories. The internal evidence of the work supports the hypothesis that Melville was indeed aware of the specific issues of

the controversy, placing explicit rehearsals of the argumentation in the mouths of characters like the minister Falsgrave in Pierre. Reverberations of the codification controversy are also apparent in the philosophical debates of Mardi.

The issues of this debate of legal philosophy suggest still another way in which legal science structured Melville's interest in ambiguity. Preceding chapters of this study have explored his use of the rules of evidence to construct unresolvable ambiguities and to make an elusive myth. Argumentation conducted mostly through the pamphlet war between the codifiers and the Common Law advocates revealed two further possibilities for the causes of ambiguity: the semantic problem in which words divorced from realities become mere chimeras; the necessity for taking into account ever-changing contingency.

Melville's assimilation of these two principles into his writing is evidenced by many episodes in the Confidence-Man, but particularly in the last scenes of the book. In those closing passages the murky light of the hold symbolically sets an atmosphere of moral uncertainty much as the fog in Twain's Huckleberry Finn performs the same dramatic and symbolic function during Huck's moral crisis. In this dimness an old man is attempting to gain wisdom by reading the Bible. But he is carrying out his studies in a mental realm far removed from the sinister realities that swirl around him. In his innocence the old man is a gullible fool. He is a perfect dupe for the child selling

the Counterfeit Detector. His attempts to use the Detector as a guide are about as futile as his attempts to use the Bible. The words of both are meaningless to him because he has never seen the realities to which they refer and finally because these realities change so rapidly that the "codified" Detector, and perhaps by implication any codified laws in the Bible (Christianity does reject the Mosaic code), rapidly becomes outdated. Words divorced from realities are meaningless; principles separated from fast changing contingency are worse than useless.

Chapter VI

In the Cold Courts of Justice

"Who's to doom when the Judge himself is
dragged to the bar?"---Moby-Dick

This final chapter completes an examination begun in Chapter IV. It elaborates on the hypothesis that Lemuel Shaw's career on the bench was a major source of Melville's persistent formulation of the judicial dilemma. Chapter IV explored Melville's preoccupation with epistemological problems similar to those found in homicide cases to come before Shaw. These questions dealt specifically with the difficulty involved in deducing malice from external appearances. Other sections of this study have outlined some of the resources for decision-making available from within the science of the law: for example, the rules of evidence and the principles of jurisprudence derived from precedent cases.

In this chapter the focus is shifted from Melville's interest in the process of judging to his conception of the character and role of the judge. For even in situations where all "facts" are known, making ethical decisions may still seem an impossible task. Melville like to portray the agony of the man who must choose between the welfare of the individual and the welfare of the community. If he observed Shaw's work at all he saw that the judge is often called upon

to decide whether to uphold law and order, no matter how unpalatable to the private conscience, or to permit an act which, no matter how justifiable by the standards of absolute right, is yet unlawful.

This predicament seemed to fascinate Melville. As early as Typee he put the question to his readers. In that first novel the protagonist asks the reader to judge his actions: jumping ship is unlawful, yet is it just to make a man suffer under circumstances he had not contracted for? The identical poser is presented at the beginning of Mardi, as the narrator prepares to leave the ship. Is he justified in leaving or no? In Mardi we are also asked to judge whether the narrator was right to free Yillah even though he had to kill a man to do so. In Moby-Dick, the first man, Starbuck, faces the same dilemma when he must decide whether to bind or kill Captain Ahab in order to prevent the destruction of the ship. In Pierre, the protagonist finds he must defy the dictates of law and community when he tries to obtain justice for a woman who may be his half-sister. Finally, in Billy Budd the predicament is formulated clearly and explicitly: though a man be innocent under the standards of absolute justice, he may nevertheless be guilty under the law.

In Billy Budd, Sailor, Melville set down for the last time a story he had long struggled to write. It is a tale in which a madman, a monomaniac, in a position of power singles out a subordinate as his victim and pursues him obsessively until he provokes his intended prey to homicide. Society then executes the man who has killed his

tormentor in self-defense. Melville introduced this same plot in an embryonic state in Mardi when the narrator kills the priest Aleema. He developed the same idea in Moby-Dick, both in the major plot of Ahab and the white whale and in the episode of Radney and Steerkilt. So far as justice may be done the blacks, the problem appears in "Benito Cereno" also.

In the earlier works the forces which combine to destroy the weak are to be found simply in impersonal circumstances: forces of nature, insanity, the institution of slavery. In Mardi there is a deus ex machina of an improbable posse. In Billy Budd the vortices meet in the mind of the captain, Edward Vere, the man who is responsible for executing the fated sailor. The spotlight in Billy Budd is upon the man who must play the role of the judge. The reader must deal with the question first posed explicitly in Moby-Dick: "Who's to doom when the Judge Himself is dragged to the bar?"

Harrison Hayford and Merton Sealts, editors of the reading text of Billy Budd, Sailor (Chicago: University of Chicago Press, 1962) offer new textual evidence which indicates that the development of Vere's role belongs to the third and final phase of composition. Sealts and Hayford theorize that Melville created the trial scene in order to dramatize what had been in earlier versions mere statements and implications concerning the captain's situation (Billy Budd, "Editor's Introduction," p. 36). If this formulation of the writing stages is correct, then it is accurate to say that the role of the

judge was the last matter of importance to occupy the author's mind. In evaluating this final phase of his work, therefore, it is useful to inquire for the sources used in creating the figure of Captain Vere, not only among the commanders of old sailing vessels, but also among the judges Melville knew. It is also fruitful to compare those playing a judicial or magisterial role in earlier works with their definitive version of the judge in Billy Budd. In this way one might construct a fair hologram of the exact position occupied by Vere in Melville's thinking. Both paths of investigation promise to shed further light upon what Judge Lemuel Shaw's son-in-law had in mind when he created the enigmatic captain of the Bellipotent.

A clue to Vere's connection with his predecessors in the earlier fiction lies in the motifs that surround these characters. Melville had a habit of using over and over again images that he associated with particular situations. Those who were given the responsibility of risky "moral navigation," as Yvor Winters called it in Maule's Curse,¹ he decorated with the emblem of the serpent and the dove entwined. As Hayford and Sealts point out in their notes (Billy Budd, p. 142, n41), Melville's use of these symbols recurs in his works from Pierre onward. The reference is to Christ's charge to his apostles, and the full quotation from Matthew 10:16 is as follows:

¹Yvor Winters, "Herman Melville and the Problems of Moral Navigation," Maule's Curse: Seven Studies in the History of American Obscurantism (New York: New Directions, 1938), pp. 53-89.

"Behold, I send you forth as sheep in the midst of wolves: be ye therefore wise as serpents, and harmless as doves." The allusion to the serpent and the dove occurs in Pierre in connection with Mr. Falsgrave, the minister; in Israel Potter with reference to Hobbes, Machiavelli, Jacob, and to Benjamin Franklin in Paris. It appears also in the imagery surrounding the various guises of the Confidence Man; in Clarel, II, xxxii, where it designates St. Francis of Sales, and then finally with reference to Billy Budd himself, who is described as being "with little or no sharpness of faculty or any trace of the wisdom of the serpent, nor yet quite a dove" (Billy Budd, p. 52). Each of the characters tagged with this imagery has the task of making practical decisions about conduct in a problematical and dangerous world. All but Billy must make decisions for whole communities as well as for themselves.

The relevance of this imagery to Captain Vere, however, must be made by a process of interpolation. Billy, though not quite as harmless as a dove, was yet more a dove than in any way a serpent. Claggart, on the other hand, was with no trace of the dove, certainly not harmless; and yet he was not quite as wise as the Serpent, who, after all, managed to arrange Adam's downfall without fatal effect to himself. One critic has suggested that if Billy and Claggart represent good and evil, they but reflect a dichotomy of natures

which were united in Captain Vere.² Thus, by implication in the structure of the story, Vere did in fact possess the duality of the serpent and the dove; "a union," as Melville said in Israel Potter, "not without warrant."

There is further evidence that one is correct in awarding Vere the standard of the serpent and the dove entwined. Melville compares the Captain, at the moment in which he receives Claggart's first accusation, to the patriarch Jacob when he was presented with the bloody raiment of his favorite son. In Israel Potter Melville placed Jacob in the same category as Benjamin Franklin, upon whom the writer did bestow the apostolic emblem. He elaborates little upon Jacob himself in Israel Potter, mentioning only that he was a "tanned Machiavelli in tents". The detail is important, however, because it suggests the political craftiness-- in other words, the attention to policy-- required of the man who would successfully dictate behavior for himself and others in this world.

Other elements of the imagery and the circumstances surrounding the Franklin of Israel Potter resemble those associated with Captain Vere. The scenes between Franklin and John Paul Jones, for example, oppose the statesman with the barbaric simplicity of the wild Scotsman, who has left neither his tartan nor his brogue behind. In the opening

²Charles Weir, Jr. "Malice Reconciled; A Note on Melville's Billy Budd," The University of Toronto Quarterly, 13 (1944), 276-85; and Paul McCarthy, "Character and Structure in Billy Budd," Discourse, 9 (1966), 201-217.

paragraphs of Billy Budd (according to the Sealts and Hayford reconstruction) the prototype of the Handsom Sailor is depicted wearing a "Highland bonnet with a tartan band", and he is designated a barbarian. In the former work the circumspect Franklin is contrasted with the vainglorious Jones (much as Vere is contrasted with Nelson). Jones seems incapable of any but the most direct action. In that case, however, the statesman Franklin is able to restrain and direct the militant spirit of the naval commander. In Billy Budd Vere's thoughtfulness only sets the stage for an action so direct and straightforward that neither he nor anyone else had the time to deter Billy's fist from its fatal stroke.

Sage discretion is the leading characteristic which emerges from the portrait of Franklin. Although he is an inventor, an economist, a writer, and a statesman, he is above all what Melville called a "practical philosopher, : a term best translated as "politician". Similarly, in elaborating upon the character of Vere, Melville tells us that the captain's literary taste ran to writers "who honestly and in the spirit of common sense philosophize upon realities" (Billy Budd, p. 62). More than once the critics of Billy Budd have accused Vere of valuing expediency above a more direct and noble course of action. Vere is, on other words, a politician in his actions on board the Bellipotent.

In Pierre the Rev. Mr. Falsgrave wears a brooch carved with the images of the serpent and the dove. Falsgrave also has a plaid

wrapper, which, as we have remarked before demonstrates his affinity, not with the wild highland tribes, but with the Scottish Common Sense School of philosophy. The minister tries to curb the hero, Pierre, who is bent upon a rash and impractical solution to his ethical dilemma. Falsgrave is discreet and politic in his behavior toward Pierre's mother, Mrs. Glendinning. His lack of real authority, however, diminishes the respect due to him. In the face of Mrs. Glendinning's hysteria (the feminine "heart" run wild) Falsgrave's discreet counsel regarding the disposition of the cases of Pierre and Delly Ulver goes unheeded. To the dramatic scene of Falsgrave overwhelmed by the raging female in Lady Glendinning, one might compare the speech made by Vere at Billy's trial in which he counsels his court not to let the heart, the feminine part in man, take over their judgment (p. 111).

Although the Master in Chancery of Bartleby does not bear the sign of the serpent and the dove, nevertheless his magisterial role in that story entitles him to some comment. After Bartleby has replied to his every request with the subdued, stubborn "I prefer not to", the lawyer becomes determined to deal with his recalcitrant clerk, but in as discreet and expedient a manner possible. He wants to fathom the truth of Bartleby's mystery. So far as discretion allows, the Master goes to extraordinary lengths to accommodate his weird employee. At the point, however, when Bartleby begins to jeopardize his business and that of others, the lawyer is forced to a decision:

the clerk is delivered over to the law and sorted by due process into the dead letter box of the municipal prison. Though he indulged himself for a while in a fantastic exploration of human nature, the lawyer proved a practical philosopher after all. Franklin, Falsgrave, and the Master in Chancery have in common with Vere their willingness to sacrifice the rights and welfare of an individual for the welfare of a larger community.

Others in Melville's works who are categorized by the recurrent imagery of the serpent and the dove as practical philosophers---the suave Confidence Man, the eloquent St. Francis of Sales, the politically astute Hobbes and Machiavelli---all share, if not the propensity to legalism, then at least a devotion to policy above all else. In this leading characteristic we find a clue to much of Vere's behavior.

Viewed in this light Vere's portrait reminds one of the first judge to occupy a place of importance in Melville's life, his uncle, Peter Gansevoort. As we recall (see Chapter I) Uncle Peter carried on a family tradition in taking a leading part in Albany's civic affairs. Although appointed a judge of the Court of Common Pleas for a short time in the 1840's, he won much of his reputation for his behind-the-scenes manipulation of state politics.

When Melville dramatized the role of Captain Vere he made the first scene portray the captain as a judge with a highly developed political consciousness. Vere's first decision with regard to the information he gets from Claggart is to try the case in his cabin, i.e., "in his chambers". In this way he hopes to avoid the embarrass

ment of a public disclosure of the affair. Many of his subsequent decisions, in enjoining secrecy upon his fellow officers and in convening a court to share in the responsibility, are politic moves calculated to promote the peace and general welfare of the ship.

Peter Gansevoort was clearly the type of the politician, but he was not the only judge in Melville's life to regard policy with paramount concern. As Chief Justice of the highest tribunal in Massachusetts, Lemuel Shaw was charged with overseeing court decisions of the utmost importance to the well-being of government both present and future. It has been remarked that in the trial of constitutional questions the American citizen is daily treated to a lesson in political science. To a broader extent, however, almost all of the questions to be decided before a court of last resort, those pertaining to the police power of the state, for example, touched in one way or another upon the policy of government. No one was more aware of his responsibility for this aspect of judicial work than Lemuel Shaw; he expressed his concern for the matter repeatedly in his opinions. Shaw, moreover, was well-known for the firm hand he kept upon his court and upon his fellow justices. In thirty years upon the bench he dissented from the majority of his court only once.³

When Captain Vere decided to convene a summary court in order to

³Leonard Levy, The Law of the Commonwealth and Chief Justice Shaw (Cambridge, Mass.: Harvard University Press, 1957), p. 25.

share the moral responsibility for the decision in Budd's case, he reserved to himself the supervision of the court and the trial. As he prepared to call the court together, he displayed the attitude of a chief justice. In testifying before his tribunal he temporarily reduced himself in rank, but he chose to stand on the weather side of the room, leaving the three temporary judges to leeward. This move placed Vere physically above the court, since the lee side would have been canted lower than the weather. Melville remarks that this circumstance was "apparently trivial" (*Billy Budd*, p. 105). The staging, however, placed Vere, whose executive responsibilities involved an attention to policy, over the court, which had primary responsibility for determining the law.

In personal characteristics Vere rather resembled Chief Justice Shaw than Peter Gansevoort. Shaw was generally described as a man who was difficult to know. He had many professional acquaintances; and because of his eminence, he and his family were accepted in Boston society. Yet Shaw had few personal friends. One recalls, for example, the stiffness of the letters between him and Allan Melvill. In his sentimental biography of the Chief Justice, Frederic Chase noted the judge's personal reserve.⁴ A diarist who had been invited to the Shaw home for a party wrote a brief account of what

⁴Frederic Hathaway Chase, *Lemuel Shaw, Chief Justice of the Supreme Judicial Court of Massachusetts, 1830-1860* (Boston and New York: Houghton Mifflin Company, The Riverside Press Cambridge, 1918), pp. 282-84.

it was like to attend such an affair at the judge's house, drawing the judge himself as most sober and uncomfortable.⁵ Captain Vere was portrayed as a man who was "lacking in the companionable quality, a dry and bookish gentleman" (Billy Budd, p. 63).

Second, Shaw is praised by his biographers for being a great family man (Chase, pp. 291-95). After Allan Melville's death, Herman had two surrogate parents, Judge Peter Gansevoort and Judge Lemuel Shaw. Melville knew both men in the dual role of stern judge and fatherly adult. From another point of view critic Leonard Levy has accused Shaw of fostering a judicial paternalism in his court (Levy, p. 165). "Fatherly" is thus a qualified compliment when paid to a judge who sat in the days when the aristocratic prerogatives of an appointed judiciary came under heavy attack from their democratic opposition. Twice in the story Vere is portrayed as exhibiting a fatherly attitude toward Billy (Billy Budd, pp. 100 and 115), but he may also be charged with a paternalistic attitude toward his court, and, fully in keeping with the stereotype of the ship's captain, toward his men as well.

Vere's emotionalism, witnessed at one point by the surgeon and then by others who saw him immediately after his last interview with Budd, coincides with another characteristic peculiar to Judge Shaw.

⁵Jay Leyda, The Melville Log: A Documentary Life of Herman Melville, 1819-1891 (1951; rpt. New York: Gordian Press by arrangement with Harcourt, Brace, and World, 1969), I, 360.

It has been said that on more than one occasion, especially in capital cases, Shaw spoke the charge to the jury or passed sentence upon the convicted felon not without visible effort to restrain the emotions that brought tears to his eyes or rendered him almost incapable of speaking (Chase, p. 285). The trait was well-known as an anomaly in the character of a man who otherwise looked and played the part of the stern and sober magistrate.

Besides the resemblances the captain bore to actual judges in Melville's life, there are other factors that deserve notice too. In the name "Edward the Honorable Fairfax Vere" there are some features that contribute to his characterization as a judge. Marvell's poem, "Upon Appleton House," is quoted by Melville in the story as the source for the captain's nickname, "Starry Vere," and in it Fairfax is the name of the protagonist who finds himself in an ethical dilemma. His betrothed had been stolen away by the lesbian, fortune-hunting nuns of "Nunappleton House". At first the valiant soldier would storm the convent with his sword and rescue the fair maiden in true heroic fashion. Fairfax is restrained, however, by his devotion to law and order. As Marvell phrased it,

What should he do? He would respect
Religion, but not right neglect:
For first, religion taught him right,
And dazzled not, but clear'd his sight.
Sometimes resolved, his sword he draws,
But reverenceth them the laws;
For Justice still that Courage led,
First from a judge, then soldier bred.
(ll. 225-232)

Marvell's modern day editor, Grosart, makes the footnote here, "Sir Guy Fairfax, the Judge".⁶ Thus Edward Fairfax Vere is connected by ancestry to a great jurist as well as to a great soldier.

Second, Vere is addressed as "Captain the Honorable". The title doubtless refers to his aristocratic lineage; nonetheless it is a title given to judges also. Claggart is always careful to address Vere as "your honor". Throughout the story Melville plays upon the notion of civilized honor in Vere and the "uninstructed honor" of Billy which connives in his downfall.

Finally we may note that "Vere" can be interpreted, as some have already done, as a Latinate version of "Truth". The appellation makes sense when it is placed in a legal context. According to Black's Law Dictionary, veredictum is law Latin for "the truth of a matter in issue, submitted to a jury for trial". Melville's pun, had he indeed intended one, would be that Vere's speech, i.e., his Vere dictum, was a formulation of the truth of the matter, which he asks the jury of officers to accept and to return as the verdict.

Vere was a man with a jurist's sensibilities. We have already remarked in part upon his literary tastes. He loved practical philosophy. He liked to read books about actual men and events; i.e., histories and biographies. His love for lasting institutions, we are told, is behind his distaste for new-fangled notions. Vere had a

⁶Andrew Marvell, The Complete Works of Andrew Marvell, ed. Alexander B. Grosart (Printed for private circulation, 1872; rpt. New York: AMS Press, Inc., 1966), I, 21.

Hobbesian opinion of the ship's people. He obviously thought the sailors' best interests were preserved, like those of the nation at large, by a devotion to law and order. He believed in sharing responsibility wherever possible, playing down personal authority in favor of legal procedure and an appeal to tradition. Vere's affinity for "Forms, measured forms" suggests the lawyer's personality. Melville hints that Vere belonged to the class he called "martial utilitarians" or "Benthamites of war". This last is a typical Melvillean jab at the lawyers who pretended to despise Bentham while acting every day in such a manner as to give life to some of Bentham's most alarming theories.

Vere had the trained eye of a lawyer. As we have noted in Chapter III on the rules of evidence, the lawyer was expected to be able to tell much about a witness from his deportment. When Claggart first approached Vere with his information, the Captain is struck by the manner of the master-at-arms:

... something even in the official's self-possessed and somewhat ostentatious manner in making his specifications reminded him of a bandsman, a perjurious witness in a capital case before a courtmartial ashore of which when a lieutenant he (Captain Vere) had been a member. (Billy Budd, p. 94)

Vere's initial decision is to try the case "in his chambers" by observing the deportment of the accuser and the accused; he wished to "scrutinize the mutually confronting visages" (Billy Budd, p. 98).

By now it must be apparent that Melville gave Captain Vere not

only the role of a judge, but the character of one as well. He drew in part upon the personalities of judges he knew. He also constructed Vere out of those traits he could have observed that lawyers held in esteem.

These literary details of characterization are not the only material Melville gleaned from his personal acquaintance with judges. Most of the ideas debated in Billy Budd (especially those expressed in the trial scene) probably originated---or at least were clarified for him---by problems of law and government Shaw confronted during a tenure of office that spanned the tumultuous period preceding the Civil War.

Shaw gained a reputation as an "Expounder of the Common Law"⁷ based upon his ability to reduce the complicated technicalities of the law to terms that his juries of laymen could understand. His opinions were learned and ponderous; yet they are replete with concrete illustrations, and they reduced complex problems to their simplest principle. Reading these opinions is always an education. Elijah Adlow, another of Shaw's modern critics and a judge himself, speaks in the following glowing terms of the Chief Justice's ability to make the law plain:

⁷ Elijah Adlow, The Genius of Lemuel Shaw, Expounder of the Common Law (Boston: Massachusetts Bar Association, 1962).

In his opinions we find something more than the mere adjudication of causes. We discover behind Shaw the jurist, Shaw the teacher. He was not content with the mere decision of a cause, but sought to vindicate his judgment by reasoning out his solution on the basis of fundamental principles. . . . He gave his contemporaries an excellent opportunity to discover his method.

(Adlow, p. 10)

Melville presents Captain Vere with the problem of explaining his intricate thinking to his fellow officers, who are assembled much like a jury. Such men he knew were guided less by their intellects than by "primitive instincts strong as the wind and the sea" (Billy Budd, p. 109). As Vere poises to begin, the narrator remarks:

After scanning their faces he stood less as mustering his thoughts for expression than as one inly deliberating how best to put them to well-meaning men not intellectually mature, men with whom it was necessary to demonstrate certain principles that were axioms to himself. (Billy Budd, p. 109)

Vere's method resembles Shaw's. He reduces the case to its simplest terms and translates its parts into concrete analogies: the conditions of war well-known to the seasoned officers. In so doing Vere sacrifices none of the rigor of his logic. The argument itself advances syllogistically. First Vere presents the principle; i.e., he declares the law. Then he asks the officers of the court martial to determine whether the facts of the case fall within the definition of that law. The procedure is identical to that of orthodox jurisprudence, the same for which Lemuel Shaw won acclaim.

The "axioms" that Vere demonstrated to his court are the principles which Shaw upheld in the Supreme Judicial Court of Massachusetts. Some of the ideas they share affect whole systems of thinking. For example, Vere's sense of history, along with his theory of crimes and punishments, sustains concepts of jurisprudence for those who worked with the Common Law in Shaw's era.

Other principles involve specific axioms of government, and these were somewhat peculiar to the work Shaw himself performed on the bench. They may be divided into two main propositions. First is whether a community and a state has the police power to abridge the rights or welfare of individuals for the sake of the general welfare. The second is the basic concept of American political science that government ought to be by law, not by men. Each of these major ideas surfaced in Shaw's day in the conflict between Romantic individualism and the demands of the ever more complex industrial society. Not infrequently the conflict worked its way to the highest tribunals.

Like Chief Justice Shaw, Vere was a magistrate who believed in the historical school of jurisprudence. He was fond of reading histories and biographies, and he was likely to cite history as part of his casual conversation. He regarded the events of the past as factors which have played a part in determining present conditions. The cumulative past predicates the course of the future as well. Vere was convinced that the Nore mutiny was a dangerous example to the

X men and a warning to those in authority that similar revolts might easily recur. For officers assigned the responsibility of decision and command, history should be read as a possible guide to the present, a design inching toward completion in the future. In Captain Vere Melville presents the portrait of a man who deals with reality as though it were a set of causes the effects of which may only be guessed.

Melville's desire to provide a counterpoint to this theme might be what lies behind the otherwise curious intrusion of the exchange which takes place after the hanging between the surgeon and the purser. The usual spasm did not occur just after suspension. The surgeon assures the purser that science has no need to account for this phenomenon except as an "appearance the cause of which is not immediately to be assigned" (Billy Budd, p. 125). Here is an effect without a cause. Other items in the story which fall into the same category are the unknown origins of Billy, the goodness of his moral character, and the "mystery of iniquity concerning Claggart's actions.

Like any proponent of the historical school, Vere believes that government should be rooted in custom carefully built up over the centuries. Vere was glad that "it would not be at variance with usage" (Billy Budd, p. 104) to convene a drumhead court in Billy's case. As critics have already noticed, in point of fact, the captain acted erroneously. There were contemporary naval laws dealing with the situation on board the Bellipotent which prescribed that only a

squadron commander could convene a courtmartial to try a serious crime on the high seas. In the case of a felony committed on a naval vessel isolated from the rest of the fleet, the captain was obligated to hold his man until he could turn him over to higher authorities. Although Sealts and Hayford accuse the author of once again not having done his homework (Billy Budd, p. 176, n234), Melville appears to have known of the lawful procedure; for he puts it in the mouth of the surgeon (Billy Budd, p. 101). Perhaps Melville deliberately chose to have the captain pursue the course that he did in order to continue building up the character of Vere by emphasizing the priority he placed upon usage over statute. Furthermore, if Melville treated the alternative of the drumhead court as a lawful option, he did so with the knowledge that American courts had vindicated Captain MacKenzie and Lieutenant Guert Gansevoort for conducting the same kind of trial in the Somers affair. Melville knew, moreover, that his father-in-law had approved more than once the summary process that had been used in Massachusetts to send fugitives back to slavery in the South.

It is admitted that in Billy Budd Melville treated some of his "facts" loosely. However, in view of the fate suffered by many, both black and white, in the Reconstruction rule of the subjugated Southland, Melville may have been accurate after all in his statement that the tale of mutiny hysteria in the British fleet is a "narration essentially having less to do with fable than with fact" (Billy Budd,

p. 128; italics mine).

Because Vere believes that the past predicates and guides the present, he gives each current decision a momentous significance. The result is the urgency and necessity he invokes throughout Billy Budd. He fears to allow the present situation to become another dangerous precedent. Immediately after the homicide, the captain strikes an attitude which dramatizes an intellectual position Shaw often assumed after he took on the responsibilities of Chief Justice. Vere stands impassive, one hand covering his face, and the narrator asks: "Was he absorbed in taking in all the bearings of the event and what was best not only now at once to be done, but also in the sequel?" (Billy Budd, p. 99).

Shaw felt the momentous nature of the cases to come before the court of last resort. None could be approached lightly because of what it might mean to the future. In this connection an anecdote was repeated about the time that the Chief Justice was discoursing rather ponderously on the question of whether a calf was exempt from an attachment on the cow. When his solemn manner produced a titter among the lawyers in the courtroom, Shaw turned to them with the rebuke that it was a very important question to a great many poor families (Chase, pp. 280-81).

To one confirmed in the historical school of jurisprudence, no present action is isolated either from its causes in the past or from its effects in the future. The thought is expressed frequently in

Shaw's opinions as a major part of the rationale behind the ultimate decision of the court. It is no exaggeration to say that the tenet lies at the base of Shaw's legal philosophy in its mature phase.

Vere shared other aspects of Shaw's judicial thinking. The Chief Justice was notorious for his adamant persistence in upholding the police power of the state. In its broadest sense, the term "police power" refers to the right of the state to do whatever is necessary in order to protect the welfare of the community as a whole. There were times, Shaw admitted, when exigency might require the abrogation of a few Individual rights; but, as he expressed it in a remark which Leonard Levy calls "the Chief Justice's most enduring contribution to the police power concept" (Levy, p. 243), a suit might "to a certain extent interfere with the liberty of action, and even with the right of property. . . but this cannot be considered as going beyond the limits that justice requires. . . ." ⁸ This premise is central to the concept of the police power---the legislature has a right to interfere with liberty or property if that is what is necessary for the common welfare. Justice demands that society be served before the individual. We have noted before (Chapter IV), in connection with Shaw's definition of the law of homicide, that his notion of justice included the idea of "social duty".

At times the operation of this principle seemed to be little more

⁸ Commonwealth v. Farmers and Mechanics Bank, 21 Pickering (1839) 542, 546; also quoted in Levy, p. 243.

than an expression of Shaw's conservative Whig affiliation. The Shaw court undeniably patronized the infant railroad industry; and his role in aiding the South to reclaim its fugitive slaves made abolitionists certain that the judge had collaborated with the cotton magnates then prominent in Massachusetts politics. It is true, moreover, that Shaw believed in manipulating the latitude found in the Common Law in order to promote a healthy business atmosphere.

Modern analyses of Shaw's career suggest, however, that his work cannot be summarized in the simplistic terms of political party affiliation. The number of decisions the Shaw court handed down which were unsympathetic to the "Cotton Whigs" argues that his political philosophy was shaped by other than mere monied interests. Levy proposes that the key factor was his insistence upon the element of "social duty". Shaw felt that the obligation to the welfare of the community is absolutely essential to the just disposition of individual cases, even if it meant interference with personal liberties. At times the rights which were abridged belonged to entrepreneurs, at times to others. If what was good for corporate enterprise was also good for the community, Shaw freely lent the weight of the law to encourage the business atmosphere. If, however, such enterprise meant only selfish gain for the investors, Shaw threw the favor of the court toward the maintenance of the public good.

The same rationale was often apparent in his handling of criminal

cases. His notion of government required that the public as a whole should be protected before the court might consider attenuating circumstances surrounding a crime. This theory of crimes and punishments, however, was orthodox, for it was to be found also in Blackstone. Punishment was not meted out for revenge or for the payment of a debt to society, but in order to deter by example any further commission of crime. (We may note that this theory was Vere's also.) In the murder trial of Abner Rogers, Shaw prefaced his charge to the jury with the observation: "the great object of punishment by law is to afford security to the community against crimes, by punishing those who violate the laws; and this object is accomplished by holding out the fear of punishment, as the certain consequence of such violation."

It was not in the best interests of society or community that people should be allowed to settle their quarrels by acts of personal violence, no matter what the mitigating circumstances. In the Webster case Shaw spoke of homicide as an injury to the rights of another. Citizens have a right to life, as well as to liberty and the pursuit of happiness. The punishment of death was a dire infringement of these fundamental rights. Only the state could be permitted to deprive a man of his life; and its only justification, by Shaw's lights, was the security and the well-being of the community.

It would seem to follow from this line of reasoning that any crimes which particularly tended to subvert the moral or political

fabric of society ought to have been received with outrage by right-minded citizens. If one reflects upon the cases which stirred the greatest public interest in Boston during the 1840's and 1850's---a few murder trials, chiefly the Webster-Parkman affair, the Somers mutiny case, and the fugitive slave renditions---it strikes one that the furor did indeed focus upon the danger of subversion in each instance.

In the "Introduction" to his edition of Dana's Journal, Robert F. Lucid drew a comparison between the Webster and MacKenzie cases, locating the matter squarely upon community support for the status quo and duly constituted authority. The following is his conclusion regarding the nub of feeling among those who considered themselves to be the pillars of Society:

position and authority in that world were inseparable partners, carrying with them responsibilities which overshadowed all other considerations. . . . The granite foundation of conservatism, asserting the transcendence of institution over individual, could hardly be more overwhelmingly apparent.⁹

The most dramatic contest between those who held the individual sacred and those who insisted that the community took priority was in the fugitive slave trials of the 1840's and 1850's. National attention was focused upon Massachusetts, a state notorious by mid-

⁹ Richard Henry Dana, Jr., The Journal of Richard Henry Dana, Jr., ed. Robert F. Lucid (Cambridge; Mass.: The Belknap Press of Harvard University Press, 1968), I, xx.

century for freeing black slaves brought within its boundaries and for doing everything possible, not excluding mob violence, to prevent southern slave owners from reclaiming their human property. Congress, therefore, made up its mind to compel the minimum cooperation from the northern communities and in 1850 passed the Fugitive Slave Act, making it unlawful for any persons or state agency to interfere with the process of capturing a fugitive. The act also provided for special federal officers and summary courts. These tended to imbue the slave-catchers activities with a sham of legality.

Although Shaw was opposed to slavery and had even helped form an early abolitionist society, he believed in the supremacy of the law. The Chief Justice did what he could to aid Negroes in getting their freedom so long as he was able to construe the law for their benefit.

In 1836 two slave cases occurred which served as preludes for the more serious events of later decades and which also reveal Shaw's position in the matter. The first of these involved two former slaves, women who had arrived in Boston on board the brig Chickasaw, Henry Eldridge, Captain. A slave-catcher had persuaded Eldridge to detain the women, locked in their cabins, until he could make arrangements for rendition. Outraged abolitionists and Boston blacks instituted legal proceedings in behalf of the women. The case was argued before Judge Shaw, sitting alone, on the question of whether Eldridge's actions in turning the brig into a federal prison were legal. The

argument spread to consideration of Massachusetts Act of 1793 which gave statutory reinforcement to the provision in the United States Constitution calling for the return of fugitive slaves. But Shaw confined discussion to the question of the legality of the detention on the brig, ruled that it was illegal, and discharged the women. Before the slave-catcher could obtain a legal warrant under the provisions of the Act of 1793, abolitionists who had packed the courtroom rushed forward, seized the ex-slaves and hurried them outside into a carriage which bore them into obscurity and freedom. Shaw had freed the ex-slaves by confining the question before his court to the legality of their detention. Because of the forced rescue it remains moot what he would have done with the pair if he had had to rule on their status under the Act of 1793.

Several weeks later, however, Shaw revealed once again that he was a friend to the anti-slavery cause. He was called upon to pass decision on a suit brought by the Female Anti-Slavery Society for the freedom of a slave girl named Med, who had been brought into the Commonwealth temporarily by her mistress visit to Boston. The speech by Benjamin R. Curtis, counsel for the slave owner, deserves notice in our study because it touches upon an issue which emerges in Billy Budd and which became a source of much bitterness between members of Boston society, particularly among the lawyers and politicians. Curtis took it upon himself on the occasion of Med's trial to remind "the judges of the full bench that their opinions 'as men or moralists'

were without bearing on the question," and "he ventured that the Court's decision should be based on what the law deemed moral or immoral" (Levy, p. 64).

The Shaw court freed the slave girl in a landmark decision. Shaw wrote the unanimous opinion, in which he meticulously treated of every point of law that applied. He asserted that slavery was against natural right, but not contrary to the law of nations. Being against natural right, it could not be supported except by positive enactment, though it could be a subject of agreement between sovereignties. The statute which covered the case of slaves on free soil applied only to fugitives, and Shaw would not apply it any farther than that. On this basis he protected the Constitution; but while he was still able, he freed the slave.

The argument in Med's case resembles that used by Captain Vere when he admits that though natural law would acquit Budd, yet martial law, or the King's law, did not. Vere forces the decision upon the court in Billy Budd, by reminding his officers of their sworn obligation to uphold the King's law, that "imperial code," before they obeyed the dictates of natural law or their own private conscience.

In 1842 Shaw refused a petition for a writ of habeus corpus in the case of a fugitive named Latimer who had been apprehended by a slave catcher bearing a warrant for his arrest on charges of larceny committed in Virginia. The petition stated that Latimer, as a citizen of Massachusetts, had title to all the civil rights accorded any other

citizen, and demanded that his case be given to a jury to decide whether he might be extradited. Shaw interpreted the action, correctly, as a ploy to thwart the provision in the Constitution for the return of fugitive slaves. He refused to support any activity which endangered the treaty made among the states and lying at the foundation of the union. Defense in the Latimer trial contended that a state law authorizing the ex-slave's arrest as a fugitive from justice was unconstitutional because it covered relations between states, a right delegated to the federal government.

Shaw was of another mind, however, for in reply he reiterated the police power of the state:

It is competent for any State to make all such laws, as in the judgment of the legislature may be necessary to secure the peace and promote good order within its borders.¹⁰

Shaw declared a recent Massachusetts statute, the Personal Liberty Law, inapplicable to fugitive slaves. According to the Liberator (November 4, 1842), a contemporary abolitionist newspaper, he had decided that Latimer's was not a case in which an appeal to natural rights or to the law of liberty would prevail. The Constitution of the United States and the law of Congress was to be obeyed "however

¹⁰Commonwealth v. Coolidge, 5 Metcalf 536, 550; this case was regularly reported in the Massachusetts Reports. The Latimer case does not appear in the Reports because it was not argued in regular session of the court or before the full bench.

disagreeable to our own natural sympathies and views of duty. . . ." because on no other terms could union between North and South be preserved. At any rate, Latimer was actually ordered returned to Virginia under a warrant for his indictment for larceny, not under a fugitive slave warrant.

Abolitionist reaction to Shaw's decision in the Latimer case was bitter and vituperative. In response, Peleg Chandler undertook his defense in an editorial in the Law Reporter. Chandler rebuked critics who blamed Shaw because he did not free the slave in accordance with the "law" of conscience. The conservative editor presented a portrait of the neutral judge who

has nothing to do with the moral character of the laws which a society chooses to make, and which, when made, it places him upon the bench to apply to the facts before him. . . . the judiciary is the mere organ of society, to declare what the law is, and having ascertained, to pronounce what the law requires.¹¹

Chandler's rebuttal argued that the ideal judge does not permit private conscience to interfere with the discharge of his duty.

The Latimer case was actually resolved when the slave was sold for \$400 to Massachusetts abolitionists who released him immediately. Once again, rendition had been avoided; but fugitive slave agitation was destined to increase rather than subside as the nation moved

¹¹Peleg Chandler, Law Reporter, 5 (1842), 483; also quoted in Levy, p. 83.

closer to civil war.

In 1851 Massachusetts had its first opportunity to test the temper of the court on the notorious Fugitive Slave Act of 1850. A black waiter named Shadrach was arrested as a fugitive as he unsuspectingly served breakfast to a United States Deputy Marshal. He was locked up in the United States Courtroom while rendition papers were prepared by the Federal Commissioner. Vigilance Committee lawyers, led by Richard Henry Dana, Jr., volunteered to defend Shadrach.

Dana personally took charge of defense proceedings, and approached Judge Shaw with his petition for a writ of habeas corpus. The petition was refused by the judge entirely on technical grounds, none of which were substantial. The abolitionists were correct in perceiving that Shaw had no real objection to the petition per se, but that he simply did not wish to cooperate with the faction seeking to undermine the Fugitive Slave Act. The impasse was resolved by a rescue performed by blacks and anti-slavery men, and a legal rendition was avoided once again.

Conservatives were naturally outraged at what they termed a case of treason. In other quarters, however, Bostonians in sympathy with the anti-slavery movement began to exult that no slave had ever been returned from their city. A showdown was inevitable. When it came it was attended with all the melodrama and solemnity that the age could have demanded.

In April, 1851, before the controversy over the Shadrach rescue had died down, Thomas Sims, a former slave, was arrested and confined in the jury room of the Court House. He was, at least technically, in a federal prison and legally outside the jurisdiction of the state courts. Abolitionists nevertheless approached the Supreme Judicial Court for a writ of habeas corpus to bring Sims before the court to decide whether he was being held in legal detention. Shaw refused the writ, saying that if the writ were issued and the prisoner brought before the Court, it duty would be to send him back to the custody of the Federal Commissioner, because it had no jurisdiction to decide whether or not he was or was not a fugitive. Shaw also refused Sims' counsel permission to argue on the constitutionality of the law of 1850.

Shaw did even more by way of emphasizing his intention to bow to the law of the land. The city Marshal, Francis Tukey, had ordered the Court House, where Sims was being held, surrounded with a heavy chain. The militia had been called up, along with two hundred and fifty United States troops, to prevent all possibility of a rescue. Anyone going in or out of the courthouse, including the judges, had to duck under the chains. Accordingly, on the morning of April 4, 1851, the aroused citizenry of Boston were presented with the spectacle of their courthouse in chains, the Chief Magistrate of the land stooping

beneath them to gain access to his chambers.¹²

This sight, along with the low-profile kept by Shaw during the later, even more notorious Burns case of 1854, prompted Richard Henry Dana, Jr., to note in his diary that the Chief Justice was "a man of no courage or pride" (Journal, II, 631). After the "bleeding Kansas" bill of 1854, all but the most conservative of the old unionist faction moved into the ranks of the newly formed Republican Party. Shaw remained among those who insisted that pacifying the South with a policy of cooperation with the slave power was the only way to save the union. He died shortly after the outbreak of the Civil War. His last public acts and appearances were in support of the Fugitive Slave Act and the territorial compromises that Webster had engineered in cooperation with Henry Clay. In this respect too there is a resemblance between the Chief Justice and Melville's captain of the Bellipotent, both of whom die before the war is ended still clinging without remorse to their principles (Billy Budd, p. 129).

Critics of the novella have jibed at Vere, finding him less than

¹²See Charles H. Foster, "Something in Emblems: A Reinterpretation of Moby-Dick," New England Quarterly, 34 (1961), 3-35; Foster sees Shaw as a de facto enemy of the anti-slavery cause and interprets Moby-Dick as Melville's defiance of his father-in-law. Shaw's role in the slave controversy was far more complex, though, than Foster seems to realize.

heroic. They have detected an "authorial attitude" which suggests that Vere's devotion to legalism is not a particularly admirable quality in a man. Shaw too was heaped for opprobrium for what people considered "unmanly" behavior toward the threats of the slave power. Although Shaw was Chief Justice from 1830 to 1860, it was not until the last decade of his tenure in office that he became the object of repeated and furious attacks by the press for his apparent collaboration with monied interests and with those who wished to tolerate the institution of slavery. This characterization was not a particularly enviable one in the North during the pre-Civil War era. Shaw emerged from the hullabaloo of the Webster murder trial in 1850 looking to some like a disgraceful puppet of the Parkman family. At about the same time he had the sad and extremely unpopular task of refusing the habeas corpus in the fugitive slave cases. As the slavery issue split the nation, Shaw's apparent political and social connections with the "Cotton Whigs" brought up for popular scrutiny more and more of his decisions on the bench.

Shaw had always been known as a stern judge whose flexibility was limited to that of the law itself. Caught in the same currents that were rapidly polarizing public opinion in many other ways, Shaw gained a reputation, for the most part unjustly, as an unfeeling martinet, a hanging judge, and a shameless tool of established authority. Moreover, the bitter rift between Shaw and Dana over the slave issue may help to explain the termination of the budding friendship between Dana

and Melville.

Modern critics of Judge Shaw have been more tolerant of his course in the slavery affairs. Leonard Levy describes Shaw in these emergencies as "earnestly a man of peace who would not consciously aggravate a situation offering the menace of a 'great national calamity'" (Levy, p. 72). The abolitionists agitated mightily throughout the slave trials. Always their cry was that men owed obedience not to the Constitution but to a higher law. Their activities, naturally, threatened the political stability of the nation. Levy summarized Shaw's situation thus:

As a judge, Shaw felt duty bound to enforce the Constitution as law regardless of whatever moral twinges he may have experienced. When the abolitionists hurled their barbs at him, they aimed at a man who regarded the return of the runaways as a legal necessity. (Levy, p. 72)

In these dilemmas Shaw's position resembles Captain Vere's. The analogy is plain. In the United States, if rebellion were to be averted, law and order had to prevail. There was in the fugitive slave cases a "legal necessity". In comparison, in the man-o'-war world of the Bellipotent law and order had to be preserved if mutiny were to be averted. There was what Melville termed a "military necessity".

In the slave cases, the rights of man which belonged to the blacks under natural law and which were guaranteed them by the state constitution of Massachusetts had to be abrogated in order that the union might be preserved and that the general welfare, as Shaw saw it, might

be secured. Billy's situation is less clear. It is not certain specifically what natural rights he loses when it comes to the crucial trial. Perhaps for that reason Melville found it necessary to strengthen his point by including the dramatic scene in which the sailor takes leave of the Rights-of-Man and makes the transition into the bondage of impressed service in the royal navy.

The codification controversy (see Chapter V) was not the only issue to raise questions about eighteenth-century conceptions of natural law. It was the slavery issue in fact which carried the fight from the courtrooms onto the battlefield. During the period following the enactment of the Fugitive Slave Act of 1850, abolitionist preacher Theodore Parker delivered an anti-slavery sermon which he later published under the title The Rights of Man (1854). The phrase figured repeatedly in Congressional debate and newspaper editorializing of the period, particularly in anti-slavery circles.

Several other aspects of Billy Budd suggest the anti-slavery controversy. The prototype for Billy is a black Handsome Sailor. Second, impressment into the British navy is like a seizure into bondage. The royal navy's claim that the fleet could not be worked without such recruitment is suspiciously like the argument used by Southern cotton growers that their plantations must fail without slave labor. Finally, Vere's fear that the sailors might mutiny if the law were not enforced is analogous on the one hand to Northerners' fear that the South might rebel and on the other hand to the Southern-

ers' fear that the slaves might revolt if they saw that the slavery law was weakening.

To return to our comparison of Vere's thinking with that of Chief Justice Shaw, it is necessary only to point out the Captain's belief that the security of discipline in the fleet overrode any consideration of an individual's welfare, no matter how much of an innocent or an "angel of God" he may be. Shaw likewise sympathized for the blacks who were innocent victims of the political situation. In view of threatened civil war, however, his first responsibility was to the community. He had no choice but to order the slaves returned.

Both Shaw and Vere affirmed the police power of the state and the necessity for backing it up in the judiciary. The police power may not be challenged by acts of private conscience. Billy could not be permitted to answer Claggart's accusation, though unjust, by the might of his fist. The court of officers could not ignore because of private feelings the need to punish mutiny; for to do so, in Vere's best judgment, would be to endanger the general welfare of the fleet and by extension that of the society it was supposed to protect. Though the analogy may not be complete, it is at least suggestive that Billy's antagonist, Claggart, is the "police power" aboard the Bellipotent. Melville makes a point of defining the master-at-arms position as a sort of "chief of police" in the ship's community (Billy Budd, p. 64). This matter is, of course, apart from the "mystery of

iniquity" to which Vere refers.

Playing the role of a Chief Justice, Vere is ultimately called upon to instruct his court. He elevates himself suddenly to be their "coadjutor" because he sees the officers comprising his summary court to be in need of help. Vere proceeds to charge them with the orthodox doctrine of judicial self-restraint, also an outstanding feature of the avowed policy of the Shaw Court.

Vere advises them that they are not authorized to create the law of the matter; they are permitted only to ascertain the facts of the case and to decide if they amount to a criminal act according to martial law. He tells them they must ignore the "mystery of iniquity" which lies at the origin of the affair. Likewise they must not debate the rightness of the law. He concludes, "the prisoner's deed--- with that alone we have to do" (Billy Budd, p. 108). Further on in his address to the court he becomes more explicit in phrasing the question to which they must confine themselves:

If, mindless of palliating circumstances, we are bound to regard the death of the master-at-arms as the prisoner's deed, then does that deed constitute a capital crime whereof the penalty is a mortal one.

(Billy Budd, p. 110)

Vere goes on to say that in omitting "palliating circumstances" this rule is contrary to Nature (note: he meant "Nature" in its old idealistic connotation), but he reminds them that in accepting their commissions they ceased to be natural free agents and became officers,

agents of the King. The argument is directly analogous to that used by Shaw in the Latimer case: that though slavery be against natural law, yet it can be a subject of agreement between sovereignties and may be supported by positive law (statute or constitution) which the courts are bound to uphold.

As public officials, in this case as officers of the courtmartial, they could not permit the scruples of their private conscience to intrude upon the duty prescribed to them by law. Vere asks:

But tell me whether or not, occupying the position we do, private conscience should not yield to that imperial one formulated by the code under which alone we officially proceed? (Billy Budd, p. 111)

This same principle of judicial restraint came up for a ruling in Shaw's court. During the course of the slave trials, two landmark decisions emerged, with the result that the issue was one long familiar to the Massachusetts Supreme Judicial Court and to anyone who bothered to read Shaw's published opinions. It is probably no coincidence that the father-in-law of the man who wrote Billy Budd is the author of the definitive American law of judicial restraint, law which remains unaltered in its essential features to the present day.

There are two parts to the theory of judicial restraint as upheld and practiced by the Shaw Court: one involves the attitude of the bench, the other that of the jury. Shaw was adamant in upholding the principle that the judiciary had no right to create new law. The court had a duty to ascertain the law and to declare what the law

was in the particular cases that came before it. The only situation in which the courts might contradict the legislature was in pronouncing upon the constitutionality of a statute, because the constitution was not alterable at the discretion of the legislature, but by separate mandate from the people. Shaw went so far as to insist that the court had no right to challenge the reasonableness of a statute because (again upholding the police power of the state) the legislature had the right to enact whatever it thought best to promote the general welfare; and no one, except itself or succeeding legislatures, had the right to criticize what it thought proper or reasonable in the execution of this duty (Levy, p. 309). Thus, despite charges that he was a "Cotton Whig," Shaw advocated a principle of judicial self-restraint as firm as the most Jacksonian legislature could desire.

As we have already seen with respect to the fugitive slave cases, Shaw firmly believed in carrying through the principle of the separation of powers. Judges must decide cases in their official capacity. They must not allow their opinions as private individuals to intrude. Nor were they permitted to pass judgment upon the moral righteousness of a statute or upon the constitution itself, but merely to ascertain and declare the law in the matter. Vere's statement to his court concerning the superiority of the "imperial code" over the private conscience might have come just as well from Shaw as from the captain of the Bellipotent.

The argument presented by the defense when the case came before

the Supreme Judicial Court had two basic points: first, the jury, by virtue of the general verdict, had the power to pass judgment upon the law and therefore must be presumed to have the right, since the law would not confer the power without the right. Second, that if the judge denies "the moral right of the jury to decide the law according to their own notions and pleasure" and to give a verdict against their own convictions, "then," said the defense, "the juror [is] compelled to do morally wrong, and 'even though the verdict be right the jury give, yet they, not being assured it is so from their own understanding, are forsworn, at least in foro conscientiae'"¹³

To these arguments Shaw replied that the jury did not have the right to deliver a verdict which was contrary to the law because the basis of freedom was "laws. . . fixed and permanent, impartially applied to all persons and cases alike, and not fluctuating and variable."¹⁴ He concluded that the principle contended for would undermine the precious certainty of the law. The result would be a chaotic situation in the courts of justice where every Grand Jury might indict as it pleased and every jurist might convict a man even though he has committed no criminal act:

¹³ Commonwealth v. Porter, 10 Metcalf.

¹⁴ Commonwealth v. Porter, 10 Metcalf 278, 279.

But the case supposes that the law may be right-fully interpreted by a jury which may shift at every trial. What then becomes of the security which every citizen is entitled to, by a steady and uniform, as well as impartial interpretation of the laws and administration of justice, by judges as free, impartial, and independent as the lot of humanity will admit? The purpose and intent of these provisions, we think, are indicated by the last article of the declaration of rights, which, after having contemplated a distribution of the powers of sovereignty into legislative, executive and judicial departments, and declared that neither should execute the powers assigned to the other, points out the ultimate object, in these emphatic words: "to the end it may be a government of laws and not of men." ¹⁵

Here then is Vere's argument as well: the private conscience must yield to that "imperial one formulated in the code under which alone we officially proceed" (Billy Budd, p. 111). The court must come to a verdict according to the law, because the security afforded by the certainty of the law demands it. Vere's "prejudgment," sensed by the officers of his court, may have been intended as an expression of this inexorable "certainty". If the court would appear capricious or unlawful in its decision, then the deterring example prescribed by the orthodox view of crimes and punishments would be set at naught and the people of the commonwealth, as well as the "ship's people" aboard the Bellipotent, would feel at liberty to overturn all established authority under the misapprehension that their superiors approved a govern-

¹⁵Commonwealth v. Porter, 10 Metcalf 280.

ment by men, rather than by law.

It is of some importance to note that principles of law argued in Billy Budd were available to Melville through his father-in-law's published opinions, if not through Judge Shaw's conversation. Of equal value, however, is the light such constructions of legal principles throw upon other elements in the tale, details which have been teasing critics for decades.

For example, throughout the novella Melville created a dramatic contrast between a government by men and a government by laws. In the beginning the Handsome Sailor is characterized as a natural leader. Then Billy is praised by the captain of the Rights-of-Man as "my peacemaker". He describes the way Billy settled the "rat-pit of quarrels" in the forecastle like a "Catholic priest striking peace in an Irish shindy" (Billy Budd, p. 47). The young sailor is a natural leader, one who might govern the crew by the mere force of his personality. Yet, when the Bellipotent arrives intent upon staffing the fleet that must protect an entire nation, the government by men, no matter how "handsome," must yield to a government by law.

Another appearance of the theme of a government by law, not by men, can be seen in the comparison of Vere to Horatio Nelson. Nelson was vainglorious and perhaps indiscreet, but he is spoken of in terms of admiration. It was Nelson's custom to lead his men to naval victories and to maintain discipline in the fleet by force of personality rather than by rule of law. Many critics have believed that Melville

offered the example of Nelson's behavior as a saving alternative to the rather shabby role played by the legalistic Vere. It is possible that there is some justification for this theory. Nevertheless, Vere stands for a government of laws; Nelson, for a government of men. One may be certain that the inclusion of this material was at least in part for the purpose of further illustrating the thematic conflict between these two opposing stances.

One minor intrusion of the same idea is found veiled in Melville's way of presenting Vere's remark:

With mankind. . .forms, measured forms are everything; . . . And this he once applied to the disruption of forms going on across the Channel and the consequences thereof. (Billy Budd, p. 128)

Although the allusion may be to the French Revolution of 1788, it is possible that it also refers to the revolt of the army under Napoleon which occurred in 1796, that "red meteor" which flew into the sky, says Melville, and ignited the British fleet sleeping at anchor a few miles away. It is interesting to note that Lemuel Shaw did a translation of a contemporary biography of Napoleon. The book was never published; but the manuscript survives in the Boston Social Law Library. It deals with the rise of Napoleon's political career in the political chaos that followed the French Revolution.

Finally, we may evaluate Billy's famous last words in the light of what we have been saying about the dramatized contrast between a government of laws and a government of men. Billy pronounces the

words: "God bless Captain Vere!" and the narrator tells us that the syllables had "a phenomenal effect, not unenhanced by the rare personal beauty of the young sailor" (Billy Budd, p. 123). Billy's presence is charismatic. He offers the possibility of a government by men. His personality is so magnetic that it was "as if indeed the ship's populace were but the vehicles of some vocal current electric" as they resonantly echo the words. The finishing touch to this paragraph is the stroke of a master pen:

And yet at that instant Billy alone must have
been in their hearts, even as in their eyes.

(Billy Budd, p. 123)

Billy leads them "alone," by the sheer magnetic force of personality, and it is this that Vere fears. The Captain touches them little in their hearts, though their every daily move is rigidly controlled under the naval laws he enforces by means of the ship's police. In the scene at the hanging the men give lip service to the law, but the fiction of the social contract was never more vulnerable to change than when Billy's words run with electrifying force through the untutored hearts of the simple tars. From these hearts might come a mandate capable of overthrowing a government by laws. A pure democracy is rank anathema to those like Vere who place a premium upon historical continuity and the certainty of the law.

There is no "testament of resistance" in Billy Budd, nor one of "acceptance" either. The sublime power in the work is the result of

the perfect tension between the two. Dipping into a vast resource of materials---which included without a doubt some of his father-in-law's experiences on the bench---Melville constructed a piece of narrative fiction, a microcosmic world in which the action, the characters, and the scenery all conspire by symbolic embodiment to summon forth those feelings of despair or rebellion which all persons must have at some time toward the imposition of political and social necessity. With consummate skill he clarified the undercurrents of daily emotional life in the modern world. Billy Budd is a cry of agony for the burden of compromise Melville carried all his life.

Conclusion

The training and approaches of what Perry Miller has styled "the legal mind" formed a deep-running and respected school of thought in mid-nineteenth century America. It has been the purpose of this study to find and demonstrate the presence of this legalism in Melville's work and to show the degree to which it became an important influence in the development of his craft of prose.

As was stated in Chapter II, I have been less concerned with cataloging the particular instances in which Melville made explicit use of legal terminology, court scenes or legal characters---such as lawyers and judges---than with exploring the possibility that the lawyer's outlook upon the world formed a large part of Melville's perspective. Thus, there exist several areas within the general subject of "Herman Melville and the Law" which have been passed over, either because they were not deemed relevant to the major thesis of this work, or because the points which they might illustrate were already sufficiently established. Under the former heading falls, in my opinion, "The Paradise of Batchelors," a short story which has a legal setting and lawyers as its main characters, but which nevertheless contains no material exactly germane to the particular concept of the legal mind under consideration. Likewise after a certain point

the private legal affairs of the Melvilles, Gansevoorts, and Shaws begin to affect Herman Melville's outlook less than earlier events concerning these families. Therefore I decided that a systematic review of all the cataloged and uncataloged papers deposited in the Gansevoort-Lansing Collection of the New York Public Library was not warranted, although some of these documents do touch upon lawsuits and other petty legal matters involving Melville or his extended family. Under the second heading---material superfluous to the illustration of already established points---should be grouped (among other subjects) all those minor instances in which Melville employed a legal term. It would be difficult to distinguish for each case how Melville's usage significantly differs from the currency which this vocabulary enjoyed in general among the writers of his day, and as early as 1965 Herbert F. Smith had definitively demonstrated Melville's ability to make sophisticated use of that kind of material. I see no reason to add to that performance by listing all the bits and pieces that only provide extra examples of the same matter. In addition, portions of White-Jacket dealing with naval law have been mentioned only briefly because their polemical nature makes them only superficially relevant to the deep, underlying attitudes I have tried to define. (Most of the law per se in White-Jacket has been analyzed sufficiently by others.) Among the poems there were several which contain elements relevant to legalism. In her article, "Melville's Classicism: Law and Order in His Poetry," Jane Donahue reports

that the evidence of the poems shows a tension ever-present in Melville's mind between the impulse toward freedom and a counter-desire for order. With respect to "The Housetop," for example, she explains that Melville recognized that social order depends on law, not on human nature;¹ and others have seen that "Dupont's Round Fight" is another piece in which Melville argues for the necessity of form. Newton Arvin has noted that Melville's choice of language in the poetry partakes less of the conventional romantic diction than of terms suggestive of industry, business, mathematics, and the law.² For the most part, though, the content of the poetry supports the conclusions of this study without offering enough additional insight to justify its inclusion in this discussion.

On the other hand, because Mardi is normally designated a minor work, it may be necessary to explain why it appears so frequently, especially in Chapters II and V of this study. Mardi is the first of Melville's writings to reflect his explicit and extensive interest in philosophy and current politics. It is also the first to depart from the simple adventure-travelogue genre into an experimental form

¹Jane Donahue, "Melville's Classicism: Law and Order in His Poetry," Papers on Language and Literature, 5 (1969), 63-72.

²Newton Arvin, "Melville's Shorter Poems," Partisan Review, 16 (1949), 1034-1046.

using multiple points of view. The book was composed under the direct stimulation of an artistically and politically active group of friends in New York City who were instrumental in developing Melville's intellectual awareness. Many of these men---David Dudley Field and Alexander Bradford, for example---were lawyers themselves or, like Mathews and Bryant, had participated in law reform, specifically in the partly abortive attempt of the 1850's to codify the law and in the more successful overhaul of court procedure then in progress in New York State. In many respects, Mardi is a record of Melville's first journey into the world of the mind, and it contains the seeds of thought which grew and flowered in later writings. Since so much concern with the law existed in the atmosphere in which Mardi was created, it should not be surprising that it proved so valuable a source in tracing the influence of the legal mind upon Melville's philosophy.

As we have seen, Melville had special opportunity to become acquainted with the law. Knowing as he did so many lawyers and judges or persons with a law education, he was socially placed where he had an excellent chance to understand and absorb even the most profound insights of philosophy and methodology that the science of the law had to offer. The works themselves show that Melville had a remarkably thorough grasp of legal matters. His facility is particularly apparent in Pierre, a book which dramatizes the issues of the codification controversy and displays a minute, technical knowledge of the

rules of evidence. This same expertise is apparent in Bartleby. Legal science is again visible in Moby-Dick and in all other stories which take up the problems of justifiable homicide and malice aforethought. Finally the comparison of the figure of Vere in Billy Budd with the character and work of Lemuel Shaw suggests strongly that Melville was intensely conscious of the moral crises experienced by a judge of any conscience or personal integrity.

It may be said in conclusion that there were two great ways in which legalism influenced Melville as a writer. The first of these is the impact it had upon his aesthetics. The second is the way in which it guided selection of some characteristic content of his work.

There are many elements of legal procedure which could have informed his experiments with prose technique. It is certainly possible that his attempt to find new forms was motivated by that attitude of jurisprudence which teaches one to disdain or at least to suspect ready formulations of the "truth". It is safe to say that there were probably no more pat formulations of this kind about in Melville's day than the conventional, sentimental fiction of the ordinary novel. Perhaps the critical awareness provided by the lawyer's inclination to doubt glib explanations prompted Melville to reject ways of writing that offered inevitable and perfect paradigms of life as it should be.

On the positive side, legal methodology could have suggested the

advantage of the multiple point of view in any attempt to render the "complete sphericity of things," and, further, along the same lines, the need to avoid second hand narrations if veracity could be better attained by a "separate citation of items". Both insights may account for much of the so-called fragmentation in some of his works, for example, changes in narrative voice in Mardi and Moby-Dick and a certain cataloging effect most apparent in Moby-Dick, but present to a certain degree in Billy Budd as well.

Beyond this influence on his aesthetics, there is ample evidence that a knowledge of the law and of contemporary legal issues provided Melville with the basic philosophic principles he chose to dramatize again and again during his career. These principles may be described under three conventionally designated areas of any philosophy: metaphysics, epistemology, and ethics. For Melville, as for most of those within the pragmatic profession of the law, the world existed, both undeniably and absolutely. He represented it as blindness and insanity to think otherwise. He was neither an idealist who tried to live entirely with a hypothetical "higher" reality nor the kind of mystic who thought one could dispense with the things that common sense presented to the mind. Rather he thought the nature of such "facts" had a mundane character (that available to anyone of common sense) and an emblematic aspect as well. The latter depended upon any individual's need to believe that a particular significance indicative of moral and spiritual value attaches to the elements of his world. No one

is exempt from this striving after meaning, yet some are more susceptible than others to its wild and often unreasoning promptings. A person in either forced or voluntary isolation from his community may soon lose touch with common sense. His single sighted perspective becomes a poor judge of the truth, while his peculiarities and prejudices must cause gross distortion in the apprehensions of his moral sense. The best knowledge is the knowledge afforded by multiple points of view, the more the better, and by a wisdom which has been historically developed through the experience of many and made coherent through the continuity of a society. Thus, although passion may be the source of all that is finest in human nature, it is also that which makes mankind liable to foolish, dangerous deeds. The heart can fall prey to a lying spirit, one likely to cause chaos and destruction. These are ideas worked out repeatedly in Melville's stories, and they are premises of the law as well. As such they dictate certain ethical conclusions: no one individual may decide all by himself what is right; rather, he must be guided by the morals and conditions of his society, and in the case of a dispute or a dilemma he must allow a socially constituted authority to settle the matter. Melville insists upon the same moral: in judging what one must do, it is right for the sake of others to follow time-tested wisdom and to abjure for all practical purposes the ravings of the Ishmael within all of us.